(1)

90-1108

No. _____

FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT CORPORATION, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
101 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031
(808) 533-2242

Counsel for Petitioners
Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

QUESTIONS PRESENTED FOR REVIEW

1. Where charitable trusts are precluded from directly developing their property without jeopardizing their tax status—and thus must resort to assigning the right to develop to third parties—are not these development assignments conveyances of Fifth Amendment protected property rights entitling the asignee-developer to *standing* where the right to develop is the subject of a taking?

2. Are inverse condemnation and due process claims *ripe* for trial when it is admitted that there is a genuine issue of fact as to the economic inviability of all permitted uses, and state law precludes damages for inverse condemnation?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
DECISIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED	3
STATEMENT OF THE CASE	3
A. Bishop is Precluded From Directly Developing Its Property as a Condition of Maintaining Its Tax Status	4
B. In Order to Make Viable Economic Use of Its Property While Maintaining Its Tax Status, Bishop Assigned The Right to Use Queen's Beach	5
C. Pursuant to The Property Assignment, Kaiser Has The Right to Use Queen's Beach	6
D. The Property Had Been Designated by the City For Resort Use Since at Least 1960, And Kaiser Built Infrastructure in Reliance on That Designation	6
E. Kaiser Has Made Many Applications For Viable Economic Uses of Queen's Beach	8
F. The City Undertook an Official Policy of Exacting "Goodies" at Queen's Beach as The Price For Further Development of Hawaii Kai	8

PAGE

BASIS OF FEDERAL JURISDICTION 9

REASONS FOR GRANTING THE WRIT 10

I. An Assignee of Development Rights Has Standing to Contest a Taking of Those Rights 10

A. The Failure of The Courts Below to Hold That Assignment of Development Rights Are Property Ignores Modern Business Practice 10

B. The Right to The Economically Viable Use of Land is a Fundamental Element of Property 12

1. This Court recognizes that use of land is a property interest 12

2. Hawaii law recognizes that use of land is a fundamental property interest 14

C. The Fundamental Right to Use Queen's Beach is Not Destroyed by Virtue of Its Assignment to Kaiser 15

II. A Taking Case is Ripe For Trial When it is Admitted That There is a Genuine Issue of Fact as to The Economic Inviability of All Permitted Uses, And State Law Precludes Damages For Inverse Condemnation 20

A. Lower Federal Courts Are in a State of Conflict And Confusion Over The Ripeness Doctrine 20

B. The Economic Inviability of All Uses Under Preservation Zoning is a Disputed Issue of Material Fact 22

C. It is Futile to Require Kaiser to Submit an Application for Uneconomic Uses For no Other Reason Than to Ripen a Case 22

PAGE

D. State Procedures Are Not Available, And in Any Event Are Not "Reasonable, Certain, and Adequate" 26

CONCLUSION 30

Appendix

TABLE OF AUTHORITIES

Cases: PAGE

Agins v. City of Tiburon, 24 Cal. 3d 266, 31 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) 12, 13, 20, 24, 27

Allen v. City & County of Honolulu, 58 Haw. 432, 571 P.2d 328 (1977) 27, 28-29

Andrus v. Allard, 444 U.S. 51 (1979) 12

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 19

Austin v. City & County of Honolulu, 840 F.2d 678 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988).....27, 28

Baker v. Carr, 369 U.S. 186 (1962) 19

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 14

City & County of Honolulu v. Chun, 54 Haw. 287, 506 P.2d 770 (1973).....27, 29

City & County of Honolulu v. Market Place, Ltd., 55 Haw. 226, 517 P.2d 7 (1973)..... 11

Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) 27

Culebras Ent. Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) 27

Curtin v. Benson, 222 U.S. 78 (1911) 13

Davis v. United States, 110 S. Ct. 2014 (1990)..... 4

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, No. 88-1593 slip op. (9th Cir. Dec. 12, 1990) (available on WESTLAW 1990 WL 198,808)..... 27

PAGE

Dickman v. Commissioner, 465 U.S. 330 (1984)..... 13

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).....13, 27

Florida Rock Ind., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986)..... 23

GHK Associates v. Mayer Group, Inc., 224 Cal. App. 3d 856, 274 Cal. Rptr. 168 (1990) 11

Griffin Homes, Inc. v. Superior Court, 224 Cal. App. 3d 1192, 274 Cal. Rptr. 456 (1990) 11

Hawaii Housing Auth. v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985) 14

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) 4

Henneford v. Silas Mason Co., 300 U.S. 577 (1937).. 13

Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987), *amended*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1557 (1989)..... 21-22

Himelstein v. City of Ft. Wayne, 898 F.2d 573 (7th Cir. 1990) 27

HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985)..... 21

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....13, 24

Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989) 27

Honolulu Memorial Park, Inc. v. City & County of Honolulu, 50 Haw. 189, 436 P.2d 207 (1967) ...27-28, 29

In re Tax Appeal of Kaiser Hawaii Kai Dev. Co., 52 Haw. 623, 484 P.2d 138 (1971)..... 14

PAGE

Kaiser Aetna v. United States, 444 U.S. 164 (1979).4, 5, 12

Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).....*passim*

Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480 244.(1989) 11, 14

Kaiser Hawaii Kai Dev. Co. v. Murray, 49 Haw. 214, 412 P.2d 925 (1966) 14

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 14

Kirby Forest Ind., Inc. v. United States, 467 U.S. 1 (1987).....13, 29

Lai v. City & County of Honolulu, 841 F.2d 301 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988) 28

Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp., 878 F.2d 1360 (11th Cir. 1989) 27

Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987) *amended*, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988) 21

Lerman v. City of Portland, 675 F. Supp. 11 (D. Me. 1987)..... 27

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986)..... 27

Loftus v. Zack Constr. Co., slip op. (Del. Super. 1989) (available on WESTLAW 1989 WL 40,954)..... 11

Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990).....22, 23

Lynch v. United States, 292 U.S. 571 (1934).....12, 17, 19

McDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).....20, 24

PAGE

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 13, 16-17, 19

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 9, 12, 13

Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 17

Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) 11

Passailainge v. United States, 224 F. Supp. 682 (M.D. Ga. 1962) 13

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 24

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 13

The Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 26

Restaurant Developers Corp. v. Druso, slip op. (Ohio App. 1989) (available on WESTLAW 1989 WL 98,548) 11

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 13

Sandy Beach Defense Fund v. City Council of the City & County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989) 11, 14, 17

Scranton v. Wheeler, 179 U.S. 141 (1900) 00

State ex rel. Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) 13

United States v. Diebold, Inc., 369 U.S. 654 (1962) .. 4

United States v. General Motors Corp., 323 U.S. 373 (1945) 12, 13, 19

PAGE

United States v. SCRAP, 412 U.S. 669 (1973) 19

Warth v. Seldin, 422 U.S. 490 (1975) 19

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 14

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977) 11, 19

Waltrip v. Sidwell Oil & Gas, Inc., 245 Kan. 55, 774 P.2d 948 (1989) 11

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 10-11, 12, 20, 24, 26

Constitutional provisions, statutes and regulations:

U.S. CONST. AMEND. V.....*passim*

U.S. CONST. AMEND. XIV .....*passim*

26 U.S.C. § 501(b) (1982) 5

HAW. REV. STAT. § 46-123 (1985) 15

HAW. REV. STAT. § 516-1 (1985) 15

HAW. REV. STAT. § 516-25(a) (1985)..... 15

HAW. REV. STAT. § 516-26 (1985) 15

REV. CHARTER OF HONOLULU 1959 § 5-514..... 7

Other Authorities:

Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988) 22, 23

PAGE

Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988) *reprinted in* 1990 ZON. & PLAN. L. HANDBOOK 305 ..... 21, 24-25

Comment, *Acquisition of Development Rights*, 23 U. MIAMI L. REV. 347 (1969) 13

D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (2d ed. 1986) 10

Morgan, *Municipal Responses to the Supreme Court's New Regulatory Taking Opinions*, 39 LAND USE L. & ZON. DIG. 3 (1987) 26

3 J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN (3d ed. 1982) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. _____

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT CORPORATION, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU,
a Municipal Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Kaiser Development Company aka KACOR Development Company[1] pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The parties are listed in the caption, except that a separate petition for writ of certiorari was filed on January 2, 1991 by the intervenors/plaintiffs Trustees of the Kamehamha Schools/Bernice Pauahi Bishop Estate, collectively referred to as "Bishop," which is endorsed by Kaiser and incorporated herein by reference.

---

1 In 1989, Petitioners' names were changed to Bedford Development Company and Hawaii Kai Development Company. For convenience, Petitioners will be referred to collectively as "Kaiser." The following list of parent companies is included in accordance with S. Ct. R. 29.1: Petitioners are wholly owned subsidiaries of Kemper/Bedford Properties, Inc.

DECISIONS BELOW

The decision of the United States District Court for the District of Hawaii granting summary judgment against Kaiser in favor of the City and County of Honolulu ("City") is reported at 649 F. Supp. 926 (D. Haw. 1986), and is reprinted in the Appendix hereto at App. 1a-44a. The *per curiam* Opinion of the Ninth Circuit is reported at 898 F.2d 112-113 (9th Cir. 1990), and is reprinted in the Appendix hereto at App. 45a-47a.[2]

---

2 This is the entirety of the published *per curiam* "opinion" of the Ninth Circuit:

> The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986). We conclude that no other cases decided since the date of that decision change the validity of Judge King's reasoning or the result in this appeal. Among the cases we have considered are . . .

App. 46a; 898 F.2d at 113 (citation to ten cases omitted). Unfortunately, Petitioners are left guessing as to the Ninth Circuit's rationale; in fact, as noted in footnotes 24 and 25 *post*, the two key standing cases are not listed, prompting the conclusion that the Ninth Circuit misconstrued or even overlooked the standing issue.

The Ninth Circuit's cursory treatment of this case alone merits granting of this petition to exercise this Court's supervisory powers, and require the Ninth Circuit to consider the case more deeply. When millions of dollars and years of effort are at stake in a public controversy that potentially affects the ability of charitable trusts to make viable use of their property and impacts new town development nationwide, the Ninth Circuit should not render such a terse decision, devoid of analysis.

The *per curiam* opinion of the Ninth Circuit in the companion case *Kaiser Dev. Co. v. City & County of Honolulu*, (9th Cir. No. 87-2689) was previously an unpublished memorandum decision reported in Unpublished Disposition Table at 899 F.2d 18. The Ninth Circuit's original opinion in that case was replete with errors; for example, it referred to a written agreement as an "oral agreement." *See* App. at 63a. In fact, the assignment was a lengthy written document. The Ninth Circuit even included Kaiser in the opinion, even though the order Bishop was appealing did not even involve Kaiser. *See* App. 56a. The Ninth Circuit, following a request by the parties for reconsideration, amended the erroneous memorandum to correct the mistakes, and ordered it published as a *per curiam* opinion reported at 913 F.2d 573. The corrected decision is reprinted in the Appendix hereto App. 66a-70a.

JURISDICTION

Kaiser brought suit in the United States District Court for the District of Hawaii for, *inter alia*, inverse condemnation, deprivation of property without due process, and inequitable precondemnation activities. Bishop filed a separate suit and intervened as plaintiffs in the present case. On September 15, 1986, the District Court dismissed Kaiser's claims by summary judgment. *See* App. 43a; 649 F. Supp. at 949.[3]

The *per curiam* decision of the Ninth Circuit, which affirmed the District Court, was entered on March 21, 1990. The Ninth Circuit denied Kaiser's timely petition for reconsideration and suggestion for rehearing *en banc* on September 4, 1990. On November 19, 1990, this Court granted Petitioner's application for an extension of time in which to file this petition until and including January 7, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Constitutional provisions, statutes, and ordinances involved are reprinted in the Appendix hereto.

STATEMENT OF THE CASE

In 1961, Kaiser was assigned the exclusive right to subdivide, develop, improve and use approximately 6,000 of the over 360,000 acres in the trust corpus of Bishop, pursuant to

---

3 The District Court held that the development interests conveyed were not property in Kaiser's hands, and dismissed each of Kaiser's claims. The court also held that even if Kaiser had property, its inverse condemnation and due process claims were not ripe. The court also summarily dismissed all of Bishop's claims except those for unconstitutional exactions and inequitable precondemnation activities. Subsequently, at the jury trial of these claims—in which Kaiser was barred from appearing—the court directed a verdict against Bishop. Bishop separately appealed, and is now separately pursuing a petition for writ of certiorari.

the terms of an agreement dated April 27, 1961 between Bishop and Kaiser (the "assignment").[4] Although only 210 of these acres, known as "Queen's Beach," give rise to the present litigation, the reason for the assignment and the effect of the decisions below on the continued existence of land holding charitable trusts such as Bishop, and on the ability of such trusts and developers to make viable economic use of their trust property, are critical.

A. Bishop is Precluded From Directly Developing Its Property as a Condition of Maintaining Its Tax Status

In 1884, upon the death of Princess Bernice Pauahi Bishop of the Kingdom of Hawaii, last lineal descendant of Kamehameha I, Bishop, a charitable trust, was created. The initial trust corpus consisted of a significant portion of the Royal or Crown property that had not been given over for actual government use or distributed to individuals in the Great Mahele.[5] The private lands of the Royalty remained, and Princess Pauahi instructed that these lands were to be utilized in perpetuity to benefit the education of Hawaiian children. All income of the estate goes to the Kamehameha Schools. The Princess required that the property be sold only if the best interest of the estate required it.[6]

---

4 All the facts herein must be viewed in the light most favorable to Kaiser since this petition seeks review of a motion for summary judgment. *See Davis v. United States*, 110 S. Ct. 2014, 2022 (1990); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Any purported factual findings by the District Court after Kaiser's dismissal are not relevant to this petition, and are not binding on Kaiser, since Kaiser was thus barred from presenting evidence at trial.

5 In the Great Mahele, or Royal land division, King Kamehameha III modified the feudal land tenure system with certain western concepts of private property ownership. *See Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

6 *See generally Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). For an in-depth discussion of the cultural and religious significance of these lands to local culture, see Brief of Amicus Curiae of the Office of Hawaiian Affairs filed in *Midkiff* (Nos. 83-141, 83-236, 83-283).

Unfortunately, following the overthrow of the Kingdom, and annexation of the Republic of Hawaii by the United States in 1898, and the eventual creation of a nationwide system of income taxation in 1913, in order to preserve its tax exempt status, Bishop was precluded from directly developing its own properties.[7] It thus became necessary for Bishop to assign a portion of its property rights, the right to develop and make viable economic use of its land, to others.

B. In Order to Make Viable Economic Use of Its Property While Maintaining Its Tax Status, Bishop Assigned The Right to Use Queen's Beach

In order to effectively sever itself from direct development and thereby preserve its charitable tax status, Bishop in writing[8] assigned to Kaiser the exclusive right to subdivide, develop, improve and use on a leasehold basis the rural eastern end of the island of Oahu, which consisted mostly of vacant lands and a historic Hawaiian fish pond.[9] The property was dotted with pig farms, radio towers and a home for aged Hawaiians. Pursuant to this long-term assignment, Kaiser undertook to create "Hawaii Kai" as a planned urban community.

Under the assignment, Queen's Beach was selected early on by Kaiser for resort development as an integral part of this planned community. Queen's Beach was the only parcel retained for development after the remainder of Bishop's prime east Honolulu oceanfront property was donated to the City for a public park.

---

7 *See* 26 U.S.C. § 501(b) (1982) (tax on unrelated business income). See also Petition for Writ of Certiorari filed herein on January 3, 1991 by Bishop, and the Statement of the Case therein, which is endorsed by Kaiser.

8 This written assignment is the agreement the Ninth Circuit incorrectly referred to as an "oral agreement." *See* App. 63a.

9 The fish pond was before this Court when the federal government attempted to confiscate Kaiser's property rights in Hawaii Kai marina without just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

C. Pursuant to The Property Assignment, Kaiser Has The Right to Use Queen's Beach

Pursuant to the assignment, Kaiser has the exclusive-right to develop, improve, and subdivide Queen's Beach, and to sell leasehold estates in the completed portions. Bishop is precluded from conveying, transferring or even encumbering any such rights in the property without Kaiser's consent. Nor may Bishop unilaterally terminate the assignment. Significantly, Bishop and Kaiser allocated between themselves all condemnation proceeds relating to the property thus explicitly recognizing Kaiser's property interest. The assignment states that "[t]he proceeds of any condemnation award or sale made to settle the threatened condemnation *shall be divided between the parties*. . . ." (emphasis added).

Kaiser's consideration for the subdivision development and improvement of the property is rights in the property. Kaiser has the right to lease the subdivided, developed and improved lots in the property, or to sell the right to lease these lots to others and designate them as lessees of the lots.

Kaiser excludes the public from the property and barricades the property to prevent entry and trespass. Kaiser, when it chooses, permits entry on the property without the consent or permission of Bishop. When Bishop is requested to permit entry on the property, it refers these requests to Kaiser.

D. The Property Had Been Designated by The City For Resort Use Since at Least 1960, And Kaiser Built Infrastructure in Reliance on That Designation

Hawaii Kai was developed in increments from west (the Honolulu side, where existing utility hookups were located) to east (the vacant Queen's Beach side). All of the incremental development since the 1960's proceeded according to the 1966 Detailed Land Use Map, with huge expenditures during the early stages. As with all new town development, the sol-

vency of Kaiser depended upon recouping the cost of infrastructure through completion of planned developments.[10]

Accordingly, in developing Hawaii Kai, Kaiser expended millions of dollars for the construction of "oversize" infrastructure relating to the development of the planned community in general, and to Queen's Beach in particular. Kaiser constructed roads, a wastewater treatment plant, and utilities, most of which have been dedicated to the City or conveyed to the appropriate utility. The cost of the oversize infrastructure allocated to the Queen's Beach resort was $8.8 million. Bishop also dedicated the land upon which the infrastructure was built—valued at the time at $11 million—to the City. The development of Hawaii Kai thus occurred over a period of years, to be capped with the resort at Queen's Beach, which would justify the massive expense in constructing an oversize infrastructure.

During the incremental development of Hawaii Kai, Kaiser had no reason to suspect that anything but extensive development at Queen's Beach, since under the 1961 General Plan and the 1964 General Plan, Queen's Beach was designated by the City for resort and commercial uses.[11] In the 1964 and 1966 Detailed Land Use Maps, the property was similarly designated by the City for resort and commercial uses, designating three hotel sites, two commercial sites, and a golf course at Queen's Beach. In the 1977 General Plan promul-

---

10 The City's attempted exaction of Queen's Beach and the denial of any economically viable use of the property is particularly painful as it was unforseen by Kaiser, and the massive losses cannot be recouped through any development of other areas of Hawaii Kai. This demonstrates the risks facing a developer wishing to undertake new town development today. For a more detailed account of the City's attempt to improperly preclude all development of Queen's Beach, see Bishop's Petition for Writ of Certiorari, filed herein on January 2, 1991 (No. _____), which is endorsed by Kaiser.

11 Although the General Plan designated Queen's Beach as a resort, the underlying zoning of the property was residential. The City had failed to update the zoning to comply with REV. CHARTER OF HONOLULU 1959 § 5-514, which required the City to enact zoning ordinances to implement the General Plan.

gated pursuant to the Revised Charter of 1973, Queen's Beach was also designated as a resort site.

E. Kaiser Has Made Many Applications For Viable Economic Uses of Queen's Beach

Since 1971, Kaiser has unsuccessfully filed applications that covered the panoply of economically viable uses of the property: Formal application for resort uses (1971); informal application for resort uses (1972-74); compromise plan for resort uses (1981); Development Plan amendment to allow resort uses (1983); compromise plan for single family residential (1981); subdivision application for single family residential (1983); application for amendment to the Development Plan to allow apartment use (1983); rezoning application for commercial uses (1971); compromise plan to allow commercial uses (1981); application for amendment to the Development Plan to allow commercial uses (1983); and application for amendment to the Development Plan to allow industrial uses (1983).[12] None of these applications for reasonable, economically viable uses was granted by the City.

F. The City Undertook an Official Policy of Exacting "Goodies" at Queen's Beach as The Price For Further Development of Hawaii Kai

Kaiser's applications were denied because in the early 1970's, the City took the position that, in the words of the

---

12 Incredibly, the City denied Kaiser's application for industrial uses, even though Kaiser had filed the application at the specific request of *the City*! The City admitted that with respect to Kaiser's inverse condemnation and due process claims that there was "a significant factual dispute concerning the economic value of Queen's Beach under the present zoning." App. 30a n.21; 649 F. Supp. at 942 n.21. Notwithstanding this factual dispute, the court granted summary judgment since Kaiser did not apply for "development" under preservation/park zoning. *Id.* The court ignored the factual dispute and Kaiser's assertion (which it should have taken as true for purposes of summary judgment) that preservation/park uses were not economically viable. Instead, the court opted for a mechanical application of the ripeness doctrine, without consideration of the rationale underlying that doctrine.

City planner in charge of east Honolulu, "[t]he City's key element in East Hawaii Kai is a 'gift' of an eighty to hundred acre park at Queen's Beach. . . ." The evidence before the District Court on summary judgment was clear (particularly so, when viewed in the light most favorable to Kaiser), and established that beginning in the 1970's, the City adopted and implemented an extortionate official policy that prohibited any economically viable use of property in Hawaii Kai unless the ocean frontage of Queen's Beach was dedicated for free to the City for a public park.[13] To quote the same City planner, "[i]f developers come in for development, why the City tries to maximize the public advantages by getting *goodies* for the public. . . ." (emphasis added). When Kaiser and Bishop refused to give in to the City's demand for "goodies," the City rezoned the entire parcel preservation/park in 1983. As a consequence of the City's action, the revised General Plan eliminated the resort designation for Queen's Beach.[14]

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the District Court was invoked under 28 U.S.C. § 1331 (1982). Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1291 (1982).

---

13 Initially, the City only demanded the most valuable shorefront portion of Queen's Beach as its price of permitting development. When it became clear the Kaiser and Bishop would not agree, the City designated the entirety of Queen's Beach as preservation/park. The City did not really dispute its predatory intent, instead claiming that its unconstitutional actions were not "official" policy of the City. The District Court concluded that "Kaiser and Bishop allege, with some support, that the City has been on a mission to acquire the land since 1970." App. 6a; 649 F. Supp. at 929.

14 As a result of this and other numerous park dedications demanded by the City since Hawaii Kai's inception—totaling 1,275 acres—the area, which is occupied by only 2.8% of the island's population has 36% of the island's parkland. Thus, any attempted exaction of additional parkland at Queen's Beach does not have a required nexus. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 838 (1987).

REASONS FOR GRANTING THE WRIT

I. An Assignee of Development Rights Has Standing to Contest a Taking of Those Rights[15]

The critical issue in this case is whether the fundamental right to make economically viable use of property—which is assigned from a person who does not have the ability to make such use to a person who does—is a conveyance of property entitling the assignee to standing to challenge government acts that infringe upon the right; in this case the very taking of those rights.

A. The Failure of The Courts Below to Hold That Assignment of Development Rights Are Property Ignores Modern Business Practice

Innovative new towns such as Hawaii Kai are becoming more common across the country. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 16.1, at 505 (2d ed. 1986). These type of developments are different, since entire new communities are developed under a single management in accordance with a comprehensive plan, rather than on an *ad hoc* basis; strict attention is paid to overall design, land use, and density. These developments provide a mix of structures: housing, commercial facilities, public facilities, community services, and cultural amenities.

Development of these projects is obviously a complex and expensive undertaking. Due to an uncertain regulatory climate, developers must be able to lock the landowner's right to develop land, and also must possess extensive expertise in land use, administrative, and constitutional law.[16] Because of

---

15 Kaiser's inequitable precondemnation activities claim is not subject to the ripeness requirement. Thus, this Court may grant this petition only with respect to Issue I (standing), and remand the case to the District Court for trial without addressing the ripeness question.

16 This Court has recognized that even the ablest lawyers would have difficulty determining federal takings law. *Williamson County Regional*

the specialized nature of development, the need for extensive capital and up-front long term financing, and the potential hazards for the ingenue, new town development is only viable to specialized "large corporations with a steady source of capital to be invested for long range purposes." *Id.* at 509. In order to entice Kaiser to commit the funds and expertise, it was necessary that Kaiser be protected in the event of a taking. In this regard, the assignment specifically allocated any future condemnation awards between Bishop, which was entitled to proceeds attributable to the land, and Kaiser, which was entitled to be compensated for its development efforts.

Similar assignments of use to others by titleholders of property are becoming more necessary and common in many contexts.[17] Use rights are transferable, and assignments such as the Kaiser/Bishop assignment are common in Hawaii, where trusts such as Bishop own substantial portions of land. *See, e.g., Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989); *Sandy Beach Defense Fund v. City Council of the City & County of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989); *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

The decision of the District Court undermines the ability of charitable trusts to have their properties developed without adverse tax consequences. Failure to recognize that the possessor of the right of use has a property interest severely inhibits the willingness of developers to undertake such pro-

---

Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 n.17 (1985). Other courts share the view. *Griffin Homes, Inc. v. Superior Court*, 224 Cal. App. 3d 1192, 274 Cal. Rptr. 456 (1990); *Orion Corp. v. State*, 109 Wash. 2d 621, 653, 747 P.2d 1062, 1079 (1987).

17 *See, e.g., Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *GHK Associates v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 274 Cal. Rptr. 168 (1990); *Restaurant Developers Corp. v. Druso*, slip op. (Ohio App. 1989) (available on WESTLAW 1989 WL 98,548); *Waltrip v. Sidwell Oil & Gas, Inc.*, 245 Kan. 55, 774 P.2d 948 (1989); *Loftus v. Zack Constr. Co.*, slip op. (Del. Super. 1989) (available on WESTLAW 1989 WL 40,954).

jects, and bodes ill for the future of new town communities and rational long term land use planning. This Court needs to take into account the modern method by which the nation's housing business operates, and should recognize that an assignment of the right of use to a developer gives it a protectable property interest, and standing to challenge unlawful government conduct that affects that interest.

B. The Right to The Economically Viable Use of Land is a Fundamental Element of Property

1. This Court recognizes that use of land is a property interest

This Court recently reaffirmed that the right to use land is a fundamental attribute of property:

> But the *right to build on one's own property*—even though its exercise can be subjected to legitimate permitting requirements—*cannot remotely be described as a "governmental benefit."*

Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (emphasis added).[18] This Court has defined "property" expansively as a "bundle of rights." *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Scranton v. Wheeler*, 179 U.S. 141, 153-155 (1900).[19] Included within the bundle of interests is the right to transfer the land, and, most importantly, *the right to develop it to beneficial uses. See* 3 J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN § 5.28[1], at 5-358 (3d ed. 1982).

---

18 In no respect can the right to develop property be termed a "privilege," for property owners have the *right* to use property, subject only to reasonable regulation that substantially advances a legitimate government interest. *Nollan*, 483 U.S. at 834. Even a reasonable regulation may effect a taking if it interferes with a property owner's reasonable investment-backed expectations of use. *Agins v. City of Tiburon*, 447 U.S 255, 260 (1980).

19 Included in the bundle of rights encompassing the "concept of property" are "a number of expectancies" including the right to exclude others and the right to put the property to economically viable uses. *See, e.g., Kaiser Aetna*, 444 U.S. at 179; *Williamson County*, 473 U.S. at 200; *Lynch v. United States*, 292 U.S. 571, 579 (1934); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).

As this Court held in *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984):

> We have little difficulty accepting the theory that the *use* of valuable property . . . is itself a legally protectable property interest. *Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order* . . . Property is composed of constituent elements and of these elements the *right to use the physical thing to the exclusion of others is the most essential and beneficial.* Without this right all other elements would be of little value.

(emphasis added) (quoting *Passailainge v. United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1962)).[20]

The expectation of use of property is legitimate and reasonable, since without the right to make viable economic use of it, property ownership is practically meaningless. *Pennsylvania Coal*, 260 U.S. at 414 (the right to coal is the right to mine it); Comment, *Acquisition of Development Rights*, 23 U. MIAMI L. REV. 347, 351 (1969) (the most valuable component of vacant land is the development right).

---

20 *General Motors Corp.*, 323 U.S. at 377-378 (property includes the right to "possess, use and dispose of it"); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) ("use is only one attribute, among many, of the bundle of privileges that make up property or ownership."). *See Nollan*, 483 U.S. at 833 n.2; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-653 (1981) (Brennan, J., dissenting). *See also Kirby Forest Ind., Inc., v. United States*, 467 U.S. 1, 14-15 (1987) (curtailment of freedom to make use of or ability to derive income from land may be a taking); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-296 (1981) (right to make beneficial use); *Agins*, 447 U.S. at 260 (right to make economically viable use of land); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (right to profit from coal mining); *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (right of use and access is "legal and essential," and goes to make up property's "essence and value"); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893) (The number and amount of uses "determines the productiveness and the earnings of the property, and therefore, largely its value."). Although some of these cases may have held that the property was not taken, none of the cases doubted that use of property was an essential attribute of property.

2. Hawaii law recognizes that use of land is a fundamental property interest

Hawaii courts take an expansive view of property, and under Hawaii law, Kaiser has a property interest in Queen's Beach:[21]

> It is well known that the term "property" is extremely broad. Without limiting adjectives or other qualifications, the term includes property which is real, personal and mixed choate and inchoate, corporeal or incorporeal.

State ex rel. Kobayashi v. Zimring, 58 Haw. 106, 122-123, 566 P.2d 725, 736 (1977).[22] The most recent case about Hawaii Kai decided by the Hawaii Supreme Court, *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 482, 777 P.2d 244, 245 (1989), noted that Kaiser has the "legal right to possess and develop" two parcels adjacent to Queen's Beach, which it uses pursuant to the assignment.

The right to use may be assessed separately from the remainder of the property. Development rights are recognized

---

21 To determine whether particular rights are property, federal courts look to state law. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Kaiser suggests that these issues of state law belong in state court; this Court may grant this petition to vacate the decision of the Ninth Circuit and direct abstention in favor of adjudication in state court.

22 *See also Sandy Beach Defense Fund v. City Council of the City & County of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989) (Kaiser has sufficient interest in other Hawaii Kai parcels to secure development permits and intervene in lawsuits challenging the validity of the permits). No Hawaii court has ever held that the Bishop/Kaiser assignment does not convey property rights. In each case where the court has considered the assignment, the development of the property (unlike the present case) had already been completed and the finished lots and buildings had already been leased to individual homeowners. The development process was over and Kaiser was no longer in possession of the right to use the parcels. *See Hawaii Housing Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985); *In re Tax Appeal of Kaiser Hawaii Kai Dev. Co.*, 52 Haw. 623, 484 P.2d 138 (1971); *Kaiser Hawaii Kai Dev. Co. v. Murray*, 49 Haw. 214, 412 P.2d 925 (1966).

by the Hawaii legislature as property rights that must be compensated in condemnation proceedings. For example, the Hawaii Land Reform Act, HAW. REV. STAT. § 516-1 (1985), includes developers as persons having legal or equitable interest in the fee or in the lessor's leasehold estate.[23] Section 516-26 provides that the developer shares in compensation paid by the Hawaiian Housing Authority. Section 516-25(a) includes developers as legal and equitable owners since the developer has a beneficial interest in the property.

C. The Fundamental Right to Use Queen's Beach is Not Destroyed by Virtue of Its Assignment to Kaiser

If Bishop had the capability to make viable economic use of its property and had no need for the assignment to Kaiser, even the courts below would conclude that Bishop's development rights were "property," and Bishop would be able to pursue claims for a taking of property.

Bishop, however, is a charitable trust and its mandate is education of Hawaiian children. It is not a development company, and alone it does not have the means to use its ancestral property to an economically viable purpose. In order to preserve its tax status, Bishop is required by law to refrain from for-profit enterprises, such as development of its land. Therefore, it is out of economic necessity that Bishop severed its property bundle in Queen's Beach and transferred several key "sticks" to Kaiser, the most valuable and essential of which is the right to use the property. Kaiser is in exclusive possession of this interest; Bishop is not. Only Kaiser can sell

---

23 The recently enacted Hawaii Development Agreement Statute permits the counties to enter into development agreements with "any person having a legal or equitable interest in real property," and permits the counties to establish procedures for considering development agreements with persons "having a legal or equitable interest in the property." HAW. REV. STAT. § 46-123 (1985). This statute clearly contemplates that developers such as Kaiser have rights in the land they are developing, and standing to enter into agreements with the City regarding the land, and "vest" their right to develop the property. It would be incongruous to allow developers to enter into such vesting agreements, yet hold that they have no protectable property interest, entitling them to standing.

or otherwise transfer its interest in Queen's Beach. The relationship between Kaiser and Bishop is well defined by the assignment which clearly transfers Bishop's right to use Queen's Beach to Kaiser, who may exercise it *to the exclusion of all others, including Bishop*. Kaiser is specifically entitled to condemnation proceeds attributable to its development efforts. If Kaiser has no standing to protect these rights, it is left without a remedy, a fundamentally unfair result.

A close reading of footnote 8 of the District Court's decision reveals the crux and achilles heel of its standing decision. App. 16a n.8; 649 F. Supp. at 935 n.8. Obviously, the court had to distinguish *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), or its entire rationale would fall.[24] The District Court held that Kaiser's rights *in the con-*

---

24 In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court held that the government must compensate a property owner for the "full equivalent" of the property taken, which includes the physical thing taken as well as the intangible right to "its productiveness—the profits which its use brings to the owner." *Id.* at 328, 344-345. The federal government condemned a privately owned lock and dam on the Monongahela River, and the owner claimed that the property taken must not only include the lock and dam, but must also include the value of a franchise contract between the owner and the State of Pennsylvania which allowed the owner to collect fees for passage through the lock. *Id.* at 314.

This Court held that the value of the contract must be included as part of the property taken, even though it was an intangible asset, since the value of land is largely determined by the uses to which it can be put. *Id.* at 328. This Court did not consider it critical whether the dam owner possessed the franchise; there is no reason that the result would have been different if the dam owner assigned the franchise to another person. Thus, to measure compensation without examining the means by which the owner made use of the property was unconstitutional. *Id.* at 329.

In the case at bar, the courts below did just that—summarily ignored the value of the use of Queen's Beach because Kaiser possessed the right. (Apparently, the Ninth Circuit ignored *Monongahela* entirely, since it was not included in the list of cases the court considered. *See* App. 46a-47a; 898 F.2d at 113). The only difference between the present case and *Monongahela* is that Bishop assigned its right to use the land to Kaiser, while in *Monongahela*, the *owner* retained the physical property and the intangible right to develop it to an economically viable use. The District Court herein erroneously distinguished *Monogahela*, holding that the case was "inapposite . . . since the government had taken the *tangible* property of the plaintiff." App.

tract, while indisputably "property," were not taken by the City since the City did not appropriate or alter the contract itself. App. 16a n.8; 649 F. Supp. at 935 n.8.[25] The court's rationale elevates form over substance. Kaiser is claiming the most significant property taken was the exclusive right to *use* Queen's Beach. This property right was assigned to Kaiser, which stepped into the shoes of Bishop for use purposes. The District Court's footnote seems to acknowledge that Bishop is entitled to recover for its development rights but somehow cannot convey this right to another person. Here, Bishop has conveyed that rights to Kaiser and even acknowledged Kaiser's interest in condemnation proceeds attributable to that development.

If Bishop's right to use Queen's Beach was not assigned to Kaiser, there is no doubt that Bishop would possess "property;" the analysis is no different because Kaiser possesses the right. The courts below fundamentally misunderstood this most basic principle, preferring instead to focus on the assignment itself as property, not on the property rights the assignment conveyed. Mislabeling the assignment a "speculative" business risk that was "frustrated," and thereby failing to recognize that use of property is a fundamental right,

---

at 16a & n.8; 649 F. Supp. at 935 n.8 (emphasis added). There is no rational reason to distinguish the rule of *Monongahela* because Bishop has, out of practical necessity, conveyed the right to use the property to Kaiser.

25 The District Court recognized that contract rights are property, *Lynch v. United States*, 292 U.S. 571 (1934), but erroneously held that *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) controlled the present case (the Ninth Circuit apparently ignored *Omnia* as well, since it was not included in the list of cases considered). In *Omnia*, the plaintiff owned a contract with a manufacturer that gave it the right to purchase steel. When the federal government appropriated the steel company's entire production and made performance of the contract impossible, the plaintiff claimed the contract was property which had been taken. *Id.* at 507-508. This Court held that while the contract itself was property, it was not taken since the dimunition of value of the contract was merely a consequential result of the taking of the steel, in which the contract owner had no rights. *Id.* at 508-510. *Omnia* is not applicable to the present case, since Kaiser, by virtue of the assignment, has rights in the property taken, specifically, the exclusive right to use Queen's Beach.

while a clever semantic exercise, is not a principled basis on which to adjudicate this case. It is no answer to say that Kaiser has no property interest because its rights to use the land derive from a contract. Kaiser's interest in Queen's Beach, like the interest of any purchaser, lessee, lessor or other property owner, is derived from a transfer in writing. Regardless of the form of the writing, in substance this is the way large properties are committed to long term development.

By summarily labeling Kaiser's property right a mere contract "expectancy," the courts below would have the essential property right that Bishop conveyed to Kaiser simply disappear. Development value has always been recognized in its expectancy state—that is the very essence of taking cases!

Who has the property right to develop Queen's Beach? Certainly not Bishop, for it conveyed those rights exclusively to Kaiser. In any condemnation award, Kaiser must assert that development rights are compensable. Kaiser and Bishop have, throughout this litigation, only sought that to which they are jointly entitled—those damages due the owner of the entire bundle of property. The City and the courts below essentially pursue a "divide and conquer" strategy, by denying Kaiser standing, and then ruling that Bishop cannot use Kaiser's investment in Queen's Beach to show its investment-backed expectations.

The rationale of the District Court creates a false dichotomy between standing and property, and imposes stricter scrutiny for standing in land-use cases where the owner of a segment of property is asserting its own interests separate from that of the title holder. *See* App. 15a; 649 F. Supp. at 934. By couching its decision in terms of "property," the court effectively denied Kaiser standing.[26] Clearly, however,

---

26 Hawaii recognizes that development rights assigned by Bishop give Kaiser sufficient standing to intervene as a defendant in lawsuits challenging development at two parcels adjacent to Queen's Beach. Interestingly, in that case, the City did not object to Kaiser's presence, and even *joined* in Kaiser's motion to intervene. *See Sandy Beach Defense Fund, et al., v. City Council of the City & County of Honolulu*, Order Granting Kaiser's Motion to Intervene, No. 87-1589-05 (Haw. First Cir. Nov. 3, 1987), *aff'd*, 70 Haw. 361, 773 P.2d 250 (1989).

Kaiser owns property, *Lynch v. United States*, 292 U.S. 571, 579 (1934), and has standing, since it was injured in fact by the City's conduct, has a significant stake in the outcome of the litigation, and was asserting its own rights. *See Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. SCRAP*, 412 U.S. 669 (1973); *Baker v. Carr*, 369 U.S. 186 (1962). This Court has never recognized an artificial distinction between property rights on the one hand and standing on the other, particularly when the plaintiff is asserting its own interests, and not the interests of others. In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis noted that "[a]mong the many applications of [the standing] rule, none is more striking than the denial of the right of challenge to one who lacks a personal or *property* right." *Id.* at 348 (Brandeis, J., dissenting in part) (emphasis added).

Similarly, in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 n.8 (1977), this Court held that a developer *who had only a contingent contractual interest in land nonetheless had standing to challenge a municipality's zoning action.* This Court made no artificial distinction between "developers" and "owners." *Id.* at 261-262. This Court took a practical look at the development business and rejected the claim that there was no economic injury since the developer was not the owner of the property, holding that the developer incurred economic injury, which was sufficient to show standing.

The failure of both of the courts below to recognize Kaiser's standing, whether by ownership of the property right to develop Queen's Beach or otherwise, reflects the courts' erroneously restrictive view of Fifth Amendment protections. The holding of the District Court (and the Ninth Circuit to the extent it can be determined from a string citation that does not even include the most significant cases) limit property to medieval concepts of ownership that were rejected by this Court at least a century ago. *See, e.g., Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). The refusal of the courts below to recognize that Kaiser's interest in developing Queen's Beach to economically viable ends is

property worthy of protection is not supported the Constitution or the subsequent decisions of this Court. The failure of the courts below to acknowledge Kaiser's Queen's Beach property right because it derived from a contract is against the weight of authority, logic, simple economic reality, and even fundamental fairness.

When fundamental rights are summarily ignored by the courts, this Court should grant this petition to reverse the decision, and allow Kaiser to present its claims to a jury that the City's outrageous conduct deprived Kaiser of its right to use Queen's Beach.[27]

II. A Taking Case is Ripe For Trial When it is Admitted That There is a Genuine Issue of Fact as to The Economic Inviability Of All Permitted Uses, And State Law Precludes Damages For Inverse Condemnation

A. Lower Federal Courts Are in a State of Conflict And Confusion Over The Ripeness Doctrine

The District Court confessed to having difficulty in determining when "enough is enough" and a regulatory takings or due process claim is ripe for review:[28]

> I admit, though, that these two cases [*Williamson County* and *MacDonald*] have made the takings inquiry even more complex, *since it is difficult to determine*

---

27 This Court need not address the ripeness issue in order to grant this petition, for if Kaiser has a property interest, it is entitled to a remand to the District Court for trial on the issue of inequitable precondemnation activities, regardless of the ripeness of its due process and inverse condemnation claims.

28 A regulatory taking claim is not ripe for review until there is a final rejection of a development request for a particular use which defines the nature and magnitude of the development which is allowed. *Agins*, 447 U.S. at 260. A rejection of a development request is not "final" until a variance, if available, has also been denied. *Williamson County*, 473 U.S. at 186. The property owner must also resort to any adequate and certain state damages remedies, if any exist, before a claim is ripe. *Id.*; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-352 (1986). Resort to futile procedures is not required. *Id.*

> *when enough is enough, and the property owner can finally come before the court with his claim.*
>
> . . .
>
> I note that I am not the first judge to have difficult applying the *Williamson County* doctrine.

App. at 27a & n.18; 649 F. Supp. at 940-941 n.18 (emphasis added) (citing *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985)).[29] The District Court asked for clarification; the Ninth Circuit gave none; Kaiser now resorts to this Court for guidance.

The District Court is not alone in its inability to rationally apply the ripeness doctrine. The decisions of the federal courts that have addressed the issue of whether the government has reached a final decision are in a state of confusion over when a case is "ripe" enough. The present case is just one in a series of conflicting ripeness cases from the lower federal courts. Two decisions of the Ninth Circuit aptly illustrate the problem, in which two separate panels of the Ninth Circuit reached utterly irreconcilable results on the ripeness issue when faced with materially identical fact patterns. *Compare Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977 (9th Cir. 1987) *amended*, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988) *with Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987),

---

29 The District Court noted, however, that a municipality cannot "designate an area for park indefinitely without instituting condemnation proceedings." App. 52a. Seven years have already passed without such a proceeding being instituted. *See also* Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L.J. 73 (1988) *reprinted in* 1990 ZON. & PLAN. L. HANDBOOK 305, 333:

> The "finality" requirement has been the most troublesome for the lower federal courts to apply. Some judges have openly admitted their difficulty in determining when "enough is enough" under this requirement. None of the judicial pronouncements on finality provide any reliable method for determining when an application is truly "meaningful" and *re*application is not necessary for a takings claim or any other claim to be ripe for consideration.

(emphasis original) (citing the present case).

amended, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1557 (1989).[30] The fact that two panels of the Ninth Circuit can reach completely irreconcilable results demonstrate that judges, as well as zoning authorities, lawyers and property owners are in an untenable situation when it comes to rational application of the ripeness doctrine.[31] The lower courts are floundering, and the resultant confusion and injustice cry out for guidance from this Court.

B. The Economic Inviability of All Uses Under Preservation Zoning is a Disputed Issue of Material Fact

Summary judgment is inappropriate when material facts such as economic viability are in dispute. The District Court recognized, and the City admitted, that "there is a significant factual dispute concerning the economic viability of Queen's Beach under the present zoning." App. 30a n.21; 649 F. Supp. at 942 n.21. Notwithstanding this factual dispute, the court entered summary judgment, erroneously substituting its own judgment for that of the jury. Other courts reject this approach. For example, in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 154 & n.2 (1990), the court held that summary judgment was not appropriate when economic viability is in dispute. Economic viability is the cornerstone issue in a taking claim, and key matters that are in dispute should not be resolved by summary adjudication.

C. It is Futile to Require Kaiser to Submit An Application for Uneconomic Uses For No Other Reason Than to Ripen a Case

Kaiser and Bishop have made seven meaningful economically viable applications for development. These applications

---

30 The Ninth Circuit cited both *Herrington* and *Lake Nacimiento*, nothwithstanding the fact that they both cannot be applicable. App. 47a; 898 F.2d at 113.

31 For an in-depth analysis of the irreconcilable nature of *Herrington* and *Lake Nacimiento*, see Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988).

were denied, and it is clear that the City will not permit a reasonable, economically viable level of development (at the very least, the City admitted that there was a significant factual dispute over the permitted viable uses of Queen's Beach).

Kaiser's economically viable plans are not possible under preservation/park zoning, and it is undisputed that under such zoning, the City does not permit residential, commercial, or resort use of Queen's Beach. In order to secure development of such uses, Kaiser was required to file requests for amendment to the Development Plan. Once these amendment requests were denied, Kaiser could not proceed further with any economically viable applications, and Kaiser's claim ripened. A variance to allow viable use is not available. The concrete harm suffered by Kaiser is the rejection of its development requests for economically viable uses of Queen's Beach. *See Florida Rock Ind., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986); *Loveladies Harbor*, 21 Cl. Ct. at 157-158. Even the *maximum* use the City claims it would allow under the new regulation—a golf course with vacation cabins—is not economically viable.[32]

---

32 One commentator even used the District Court's decision herein as an example of nonsensical application of the ripeness requirements:

> However, in recent cases, some courts have seized upon the phrase "meaningful application" and so distorted it as to make it meaningless. How? They focus *solely* on the theoretically permitted uses, place the burden on the property owner of *disproving* the economical viability of that laundry list, and then disregard evidence that the theoretically permitted uses are not economically viable . . . With all the respect due it, how does one make a "meaningful" application to develop when the evidence establishes that *none* of the theoretically permitted uses would be economically viable if developed? What point is served by compelling a property owner to spend the tens or hundreds of thousands of dollars required to prepare development plans, not to mention the years that such efforts can typically entail, when the end result would be a project which could not economically be developed if it were approved? The requirement of such an expensive key to the courthouse door disserves the nation's economic health as well as its ability to house itself.

Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 792-793 (1988) (emphasis original) (citing the present case).

This Court has recognized that an owner need only apply for development consistent with reasonable investment-backed expectations to demonstrate that a case was ripe. *Agins*, 477 U.S. at 262-263 (property owners desired residential development and are free to pursue their investment-backed expectations, albeit at a lesser density). Similarly, in *Williamson County*, this Court did not require the owner to pursue development which did not comport with his reasonable investment-backed expectations. *Williamson County*, 473 U.S. at 188-189 (property owner desired residential development, and was free to pursue that use, albeit at a lesser density).[33]

This Court has emphasized that the requirement of one meaningful application to ripen a case does not require the property owner to embark on an odyssey of development applications in order to pinpoint the scope of the regulation which denies all economically viable use of the property. This Court made clear that such an attempt is hopelessly quixotic, since the application process is the most wasteful and inefficient means of fixing the scope of allowed development. *MacDonald*, 477 U.S. at 352 n.8.[34] To avoid devolution of

---

33 *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1976) (unknown whether "commission would deny approval for all uses that would *enable plaintiffs to derive economic benefit from the property*") (emphasis added); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (act did not prevent beneficial use of land); *MacDonald*, 477 U.S. at 347, 352 n.8 (property zoned residential, owner desired residential development).

34 One commentator pointed out the inefficiency of using the application process only as a means to force the government to take a stand:

> Because of the finality requirement, a landowner must have the financial staying power, not only to submit various proposals for "lesser" intensities than the use originally proposed, *but also to submit proposals for whatever other uses could conceivably be permitted on the site under the local zoning ordinance.*
>
> . . .
>
> If the local government repeatedly turns down what the landowner believes are meaningful applications for development, the landowner

the application process into a shell game in which the property owner is forced to file endless applications to determine the "lowest and worst" use the government may permit (without denying all use), the "meaningfulness" of a development request need not herald the merits of a property owner's claim that the regulation has taken all uses, only establish as a threshold that the government has taken a position from which remaining use can be measured.

Further applications for development under preservation/park zoning would be meaningless. The facts before the District Court on summary judgment, viewed in the light most favorable to Kaiser, make it clear that none of the allegedly permitted "uses" of Queen's Beach are economically viable.[35] Therefore, it would be a useless and futile act for Kaiser to apply for uses that it does not desire, and has no intention of pursuing if granted, simply to gain access to court.

When the permitted uses under new zoning are not economically viable, a meaningful application is one in conformity with planning and zoning prior to the challenged unlawful conduct. Where, as in the present case, a property owner charges that the placing of property in a land use category does not permit economically viable use, the property owner should not be required to file an application for nonviable uses before seeking judicial relief. Such an application

---

may have no alternative but to challenge the government's position in court.

Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988) *reprinted in* 1990 ZON. & PLAN. L. HANDBOOK 305, 334-335 (emphasis added).

35 Given the City's extortionate official policy of permitting no use of Queen's Beach other than as a dedicated public park, it is clear that *no* application for development would be approved.

The decision of the District Court at trial to force a valuation expert to assume a zero value of Queen's Beach in assessing the economic viability of preservation/park "uses" is not binding on Kaiser, since Kaiser was not permitted to participate in the trial; for purposes of summary judgment, the court should have taken as true Kaiser's assertion that no viable uses were permitted, which was admitted to be a significant factual issue.

would be a charade, since the owner neither intends to pursue such development nor believes it would be economically viable. Forcing the property owner to file an economically unviable application is the epitome of meaninglessness, since it is filed only to *perhaps* squeeze an answer from the government as to what use it may or may not permit, and thereby *possibly* gain access to the courthouse.[36] This allows the government to use the ripeness requirements to evade judicial review until the property owner accedes to exactions or becomes insolvent, belies the sincerity of the property owner's true plans, and additionally would constitute an admission that could be used against the owner at trial.

D. State Procedures Are Not Available, And in Any Event Are Not "Reasonable, Certain, And Adequate"

The District Court also concluded that Kaiser did not resort to state procedures for compensation or show that such procedures are unavailable or inadequate. *See* App. 30a; 649 F. Supp. at 942. This Court's rule that if a state's procedures are not "reasonable, *certain* and *adequate*," the property owner need not resort to them, was ignored. *Williamson County*, 473 U.S. at 194 (emphasis added); *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

The District Court also ignored clear Hawaii law precluding damages for inverse condemnation, and turns this Court's requirement that state procedures be "reasonable, certain, and adequate," on its head. The District Court places the burden on the property owner to *prove a negative*: that

---

36 Requiring the property owner to file such an application is no guarantee the government to take a position; rather, the government may say, *ad infinitum*: "No, we will not permit *this* use, but that does not preclude us allowing *some other* use of the property," thereby requiring more applications from the owner. Zoning authorities are not in the habit of taking definitive positions that no use may be made of property, since they realize that by not taking a stand, they may use ripeness requirements to avoid judicial review. *See* Morgan, *Municipal Responses to the Supreme Court's New Regulatory Taking Opinions*, 39 LAND USE L. & ZON. DIG. 3, 5 (1987) (advising zoning authorities to avoid giving a final definitive position).

the state would not conceivably allow damages for inverse condemnation.[37]

Hawaii procedures for obtaining compensation are hardly "reasonable, certain, and adequate." Indeed, Hawaii follows the rule of *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276-277, 31 P.2d 25, 31 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), in which California limited inverse condemnation remedies to injunctive relief, since requiring compensation would limit the freedom of planning authorities. At the time of the District Court's decision, a property owner's exclusive remedy under the Hawaii Constitutition and statutes was invalidation of the zoning ordinance.[38] The District Court misread Hawaii decisions that follow *Agins* and preclude damages for inverse condemnation, even in cases of physical occupation by the government. *Allen v. City & County of Honolulu*, 58 Haw. 432, 439, 571 P.2d 328, 331 (1977); *City & County of Honolulu v. Chun*, 54 Haw. 287, 288-289, 506 P.2d 770, 773 (1973); *Honolulu Memorial Park, Inc. v. City*

---

37 The lower federal courts are divided on this issue. Some courts require use of state procedures, even if those procedures are unclear or do not prohibit a damage remedy. Other courts do not require use of state procedures, unless state law clearly precludes inverse condemnation. This Court should grant Kaiser's petition to resolve this unsettled question. *Compare Himelstein v. City of Ft. Wayne*, 898 F.2d 573, 576 (7th Cir. 1990); *Culebras Ent. Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987), *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Lerman v. City of Portland*, 675 F. Supp. 11 (D. Me. 1987); *Austin v. City & County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988) *with Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1372 (11th Cir. 1989).

38 After *First English*, 482 U.S. at 317, state courts cannot constitutionally deny damages as a remedy for a regulatory taking. At the time Kaiser was dismissed in 1986, however, this Court had yet to decide *First English*, and the time at which the taking occurs is the appropriate time at which to assess the adequacy of state procedures. *See Del Monte Dunes at Monterey, Ltd., v. City of Monterey*, No. 88-1593 slip op. (9th Cir. Dec. 12, 1990) (available on WESTLAW 1990 WL 198,808).

& County of Honolulu, 50 Haw. 189, 194, 436 P.2d 207, 222 (1967).[39]

In *Allen*, Hawaii limited remedies in the analogous claim of vested rights –which "reflects principles of common and constitutional law"—to injunctive relief. 58 Haw. at 435, 571 P.2d at 329. The Hawaii Supreme Court held that damages are not available in downzoning disputes, and followed the view that due process, not eminent domain, is the sole limitation on zoning police power:

> In our opinion, to permit damages for development costs is not only unprecedented but would be unsound policy. Were we to affirm the award of damages, the City would be unable to act, if each time it sought to rezone an ares of land it feared judicially forced compensation. *Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources.*

Id. at 438, 571 P.2d at 331 (emphasis added). Further, in denying compensation, *Allen* cited an "article dealing with *inverse condemnation, another type of monetary award in downzoning cases*" and held that the City should not be required to consider compensation when enacting zoning ordinances, and that judicially forced compensation is usurpation of the City's legislative function. Thus, invalidation of the zoning regulation is the sole remedy in Hawaii. *Id.* at

---

39 In *Lai v. City & County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988), the Ninth Circuit stated that "[h]ere, . . . *the parties agree that there are no state procedures for such compensation claims.*" (emphasis added). At the very least, this is a concession by the City in one case that there was no adequate damage remedy for inverse condemnation under Hawaii law. In *Austin v. City & County of Honolulu*, 840 F.2d 678, 681 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), the City did not admit that state procedures were inadequate, and the Ninth Circuit held that "[a]lthough we find no [Hawaii] case that recognizes inverse condemnnation as a cause of action, neither do we find one that rejects it." *Id.* The City's conflicting positions in *Lai* and *Austin* aptly illustrate the fact that Hawaii state procedures are not "reasonable, certain, and adequate," since even the City cannot make up its mind whether state procedures are available.

438-439, 571 P.2d at 331 (emphasis added). According to Hawaii, the power of eminent domain is not implicated unless the developer has secured the last discretionary permit from the City. *Id.* at 439, 571 P.2d at 331. Even then the remedy is invalidation. Hawaii could not have been more clear in its preclusion of damages.[40]

Even if the Hawaii Supreme Court's decisions were not clear, this Court requires that a state's procedures are "certain" and "adequate" before a property owner is required to resort to them prior to coming to federal court. This Court should grant Kaiser's petition to correct this fundamental error by the courts below.

---

40 The District Court also overlooked *Chun*, in which the Hawaii Supreme Court held that in an analogous claim for oppressive precondemnation conduct in a direct condemnation action, no damages are available to a property owner for losses occurring prior to the date of summons. The court noted that Hawaii did not follow the rule that property owners are entitled to compensation for oppressive precondemnation activities under the Fifth Amendment of the United States Constitution. *Chun*, 54 Haw. at 288-289, 506 P.2d at 773.

Similarly, in *Honolulu Memorial Park, Inc. v. City & County of Honolulu*, 50 Haw. 189, 194, 436 P.2d 207, 211 (1967), the Hawaii Supreme Court held that even in a case of physical invasion, when the City wrongfully occupies property, "ejectment is the proper remedy for restoration to the [property owner] of that part of its premises from which it has been ousted, notwithstanding the power of eminent domain vested in the appellant-city and county." *Cf. Kirby*, 467 U.S. at 5 (occupation of property by government may trigger inverse condemnation suit).

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the cause remanded for adequate consideration below.

Respectfully submitted,

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Counsel for Petitioners
Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-0389

Filed September 25, 1986
Walter A.Y.H. Chinn, Clerk

KAISER DEVELOPMENT CO., also known as KACOR DEVELOPMENT CORP., a California corporation, KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

—and—

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, and HENRY H. PETERS, JR., Trustees of the Kamehameha Schools/ Bishop Estate,

Plaintiffs/Intervenors,

—vs.—

CITY AND COUNTY OF HONOLULU,

Defendant.

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Kaiser Development Co. (Kaiser)[1] and plaintiffs/ intervenors Bishop Estate (Bishop)[2] sued defendant City and

1 The named plaintiffs are Kaiser Development Co. and Kaiser Hawaii Kai Development Co. Kaiser Development Co., previously known as Kacor Development Co., is a California corporation, licensed to do business in Hawaii. Kaiser Hawaii Kai Development Co. is a Nevada corporation, licensed to do business in Hawaii. Plaintiffs refer to themselves collectively as "Kaiser."

This court notes that it was plaintiff Kaiser Hawaii Kai Development Co. that entered into a development agreement with Bishop in 1961 to develop Hawaii Kai. Plaintiffs allege that plaintiff Kaiser Hawaii Kai Development

(*Footnote 2 appears on next page*)

County of Honolulu (City) for various actions taken by the City affecting a parcel of property known as Queen's Beach, which Kaiser and Bishop had sought to develop. Plaintiffs argued, *inter alia*, that the City's regulations and other actions rise to the level of a "taking" of their property and that the City has engaged in inequitable precondemnation activities for which they are entitled to compensation. The City brought motions for summary judgment against both plaintiffs on all claims. As discussed herein, defendant's motions are GRANTED IN PART and DENIED IN PART, the net result being to dismiss Kaiser from this lawsuit, and to allow Bishop to pursue only its claims for inequitable precondemnation activities.

I

BACKGROUND

A. *Facts*

The Bernice Pauahi Bishop Estate (Bishop) owns approximately 6000 acres situated at Maunalua, in the City and County of Honolulu, on the Island of Oahu. In 1961, Bishop entered into a development agreement with Kaiser Hawaii Kai

---

Co. holds the right to develop Queen's Beach for the benefit of Kaiser Development Co., and that Kaiser Development Co. has the right to develop Queen's Beach pursuant to the development agreement. There is nothing in the record indicating the relationship between these two named parties. The court notes only that any rights Kaiser Development Co. may have derive from those of Kaiser Hawaii Kai Development Co. pursuant to its development agreement with Bishop. Kaiser Development Co. does not assert rights independent of Kaiser Hawaii Kai Development Co.

2 Plaintiffs/intervenors Lyman, Jr., Takabuki, Thompson, Richardson, and Peters, Jr. are trustees of the Kamehameha Schools/Bishop Estate. The Bishop Estate was established in 1884 by the will of Princess Bernice Pauahi Bishop as a perpetual trust for the education of Native Hawaiians. The corpus of the trust is land originally owned by the Princess. Trust lands, of which Hawaii Kai is a part, comprise about eight percent of the land area in the state and 15.1% of the lands on Oahu. The estate owns 19.6% of Oahu's residential land and 24.43% of Oahu's unimproved residential land. *Hawaii Housing Authority v. Lyman*, 68 Hawaii 54, 66 n.7 (1985).

Development Co. (Kaiser)[3] to develop this land into a new urban community. Much of this new community, Hawaii Kai, is now completed.

The subject of this dispute, however, is a large hotel/resort complex that Kaiser had hoped to build at Queen's Beach, a 210-acre parcel of land at the northeasterly end of Hawaii Kai. Kaiser alleges that it considered this resort its "crown jewel" and economic reward from the vast community development project. According to various affidavits, Kaiser spent over $8 million in building the Hawaii Kai infrastructure "oversized" to accommodate the anticipated development at Queen's Beach. However, Kaiser made no attempt to develop Queen's Beach until 1971.

The 1959 Honolulu City Charter required the adoption of a general plan for the long-range development of the city. Under both the first General Plan of 1960 and a second General Plan of 1964, Queen's Beach was designated as a resort and commercial area. Similarly, in both the 1964 and 1966 Detailed Land Use Maps (DLUMs), which were adopted for numerous areas of Honolulu to accompany the General Plan, Queen's Beach was designated as a resort and commercial area. In 1973, the Revised Charter for the City and County of Honolulu supplanted the previous Charter, and a new General Plan became effective in 1977, which also listed Queen's Beach as a potential resort site. In 1982, however, the City adopted a revised General Plan, which modified the population densities and eliminated Queen's Beach as a future resort site. As required by the 1973 Charter, in 1977, the City began to formulate development plans for all areas of the city, including East Honolulu, the area of Hawaii Kai. In 1983, the City enacted a new Development Plan for East Honolulu, which changed the previous resort designation on the 1966 DLUM to preservation and park uses.

This litany of plans is made somewhat more confusing by the fact that the *zoning* codes were not updated when new general plans were adopted. From 1960 to 1969, the zoning for Queen's Beach was residential. In 1969, the Comprehen-

---

3 *See supra* note 1.

sive Zoning Code also zoned Queen's Beach for single family residential homes. This zoning remained in effect until 1984, when it was changed to P-1, or preservation/park.[4]

---

4 Article 3 to the Comprehensive Zoning Code of 1978, as revised, provides for the P-1 Preservation District as follows:

Sec. 21-3.1. *Legislative Intent.*

The purpose of creating this district is to establish areas to protect and preserve park lands, wilderness areas, open spaces, beach reserves, scenic areas and historic sites, open ranges, watersheds and water supplies; to conserve fish and wildlife; and to promote forestry and grazing. It is intended that all lands within a preservation district which are under state conservation district jurisdiction shall be governed by the requirements and procedures of Chapter 205, HRS, as amended. (Am. Ord. 3234, 84-42)

Sec. 21-3.2. *Use Regulations.*

Within a P-1 Preservation district, only the following uses and structures shall be permitted:

(a) Principal uses and structures:

(1) Fish hatcheries and fish ponds;

(2) Forests and forestry;

(3) Game preserves;

(4) Private, non-illuminated golf courses, including par-3 but not miniature, with a minimum area of 10 acres;

(5) Open agricultural uses not requiring intensive cultivation, including orchards, vineyards, nurseries, and the raising and grazing of livestock other than swine;

(6) Parks, recreational areas, botanical and zoological gardens, golf courses, marinas and other public buildings and uses;

(7) Public utilities installations and substations; provided that offices or storage or maintenance facilities therefor shall be permitted only as conditional uses;

(8) Watersheds, wells, water reservoirs and water control structures.

(b) Accessory uses and structures;

Uses and structures which are customarily accessory and clearly incidental and subordinate to principal uses and structures; provided that roadside stands for sale of agricultural products shall not be permitted as accessory to agricultural uses in this district; provided further, that in connection with golf courses, accessory

(*Footnote continues on next page*)

Kaiser first actively sought to develop Queen's Beach in 1971 when it applied to rezone the property from residential to resort in accordance with the 1964 and 1966 DLUMs. Kaiser later withdrew the request, it alleges, because of confusion engendered by the City's activities to acquire the area as

---

uses shall be designed and scaled to meet only the requirements of the members, guests or users of the golf course.

Private utilities, including temporary sewage treatment plants, shall also be permitted as accessory uses, provided such use is approved by the Director of Land Utilization. Private utilities so approved shall be permitted notwithstanding the location on a non-contiguous zoning lot or in another zoning district of the principal use or uses served thereby, and paragraph (1) of the definition of "accessory use" in Section 21-1.10 shall be inapplicable thereto.

(c) Conditional uses and structures.

Uses and structures hereinafter specified, subject to compliance with the provisions of part D of Article 2 hereof:

(1) Cemetery, columbarium, crematory, and mausoleum;

(2) Extractive industries, including the removal of sand, rock, soil and gravel;

(3) Private marinas, including facilities for storage and repair of boats and sale of boating supplies and fuel;

(4) Private refuse dumps, sanitary fills and incinerators;

(5) Recreation and amusement facilities of an outdoor nature, other than as specified under permitted principal uses and structures;

(6) Storage or maintenance installations for public utilities;

(7) Television or other broadcasting stations and line-of-sight relay devices;

(8) Private recreational camps;

(9) Private riding academies;

(10) Facilities for movie and television program production.

(d) Special permit uses and structures.

Uses and structures hereinafter specified, subject to compliance with the provisions of part E of Article 2 hereof:

(1) Private vacation cabins;

(2) Temporary structures and uses incidental to land development or building construction. (Am. Ord. 3234, 3906, 4412)

a park. Kaiser did not again seek a zoning change until May 1983. This request was turned down and the denial was upheld by the zoning board of appeals.

Kaiser and Bishop allege, with some support, that the City has been on a mission to acquire the land since 1970. They contend that the City tried to impose unreasonable exactions as a prerequisite for hotel development at Queen's Beach, such as dedication of the oceanfront as a public park; that the City downzoned Queen's Beach and downgraded the density in the area to depress the acquisition price of the land; and that the City's policy has been to freeze development at Queen's Beach until it could be acquired as a park.

B. *Complaint*

Kaiser's and Bishop Estate's complaints are nearly identical and allege violations of their civil and constitutional rights under 42 U.S.C. § 1983, the Fourteenth Amendment, the Fifth Amendment, and the Contracts Clause. Kaiser alleges that it has property rights in Queen's Beach pursuant to its development agreement with the Bishop Estate. Bishop alleges that it dedicated lands to long term uses in anticipation of realizing rental income from the development of the property under the agreement with Kaiser.

Plaintiffs allege a violation of their due process rights under two takings theories. First, they allege, under principles of inverse condemnation, that the City's wrongful imposition of confiscatory land use regulations deprived them of all economically viable use of their property without just compensation.[5] Second, plaintiffs allege a taking under a "pre-

5 The Supreme Court has noted two theories which could potentially support a claim of "taking" by overregulation. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S. Ct. 3108, 3116-17, 3122-23 (1985). First, a plaintiff may assert that a zoning or other regulation may be so restrictive as to deny him all reasonable beneficial use of his property and thus has the same effect as a taking of the property for public use. Under this theory, such a taking would arguably require payment of just compensation under the fifth amendment.

(*Footnote continues on next page*)

condemnation blight" theory. They argue that the City's intent all along has been to acquire Queen's Beach as a park, that the City restricted development of the property, attempted to force dedication of a substantial portion of the property, and has otherwise engaged in such inequitable pre-condemnation activities as to result in "planning blight" for which they are entitled to compensation. *See, e.g., Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983); *Washington Water & Light Co. v. East Yolo Community Services District*, 120 Cal. App. 3d 389, 174 Cal. Rptr. 612, 616-17

Alternatively, such a regulation could be viewed as violating the fourteenth amendment. This theory posits that

> regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the Government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy for a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.

105 S. Ct. at 3122.

Although the Supreme Court has often referred to regulation that "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), it has never determined whether compensation is constitutionally required in inverse condemnation actions. In fact, the Court has left this issue unanswered four times since 1980. *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S. Ct. 3108 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Supreme Court will probably face this issue yet again next term. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 106 S. Ct. 3292 (1986) (probable jurisdiction noted).

Given my disposition of these motions, I need not offer my opinion on the issue today. *But see Lai v. City and County of Honolulu*, Civil No. 78-0355 (D. Hawaii Mar. 21, 1986) (findings of facts and conclusions of law awarding damages under the Fifth and Fourteenth amendments on theory of inverse condemnation). *See also Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983) (indicating probable appropriateness of award of damages for inverse condemnation).

(1981); *Taper v. City of Long Beach*, 129 Cal. App. 3d 590, 181 Cal. Rptr. 169, 176-77 (1982).

Their additional substantive due process claims are that the regulations have deprived them of their "vested property rights" to develop Queen's Beach in accordance with the 1966 DLUM, and that the zoning regulations themselves violate due process.

Their complaint also alleges a violation of their procedural due process rights, that is, a notice and opportunity to be heard on the decision to downzone Queen's Beach.

Finally, Bishop and Kaiser claim that the City's actions have violated their constitutional rights under the Contract Clause.[6]

Kaiser and Bishop pray for just compensation for their various takings claims, consequential damages, and declaratory relief.

C. Defendant's Motion for Summary Judgment

The City makes the following arguments in support of its motions for summary judgment:

—Kaiser does not have a protected property interest in Queen's Beach;

—Kaiser lacks standing;

—Kaiser's and Bishop's claims are not ripe for review;

—Kaiser and Bishop have not been denied substantive due process;

—Kaiser and Bishop have not been denied procedural due process;

—The City's regulations do not violate the fifth amendment because Bishop has already earned a significant return from its Hawaii Kai development; and

—Kaiser and Bishop have not suffered an impairment of contract.

---

6 Kaiser and Bishop may also be asserting a violation of the Equal Protection Clause. *See infra* note 25.

The City recognizes that there are genuine issues of material fact in dispute, particularly as to whether the City engaged in inequitable precondemnation activities and whether there exists any economically viable use to Queen's Beach under the present zoning. The City stresses that it is not seeking summary judgment on these issues, *per se*, but rather that there are other reasons, not involving disputed facts, that entitle it to summary judgment on all counts.

D. *Applicable Legal Standard*

The standard this court must apply in reviewing the instant motions is well established. Under Fed. R. Civ. P. 56, a motion for summary judgment may only be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The City has the heavy burden of showing the absence of any material facts; the underlying facts must be viewed in the light most favorable to Kaiser and Bishop, and all inferences must be drawn in their favor. *E.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970).

Plaintiffs appear to assert that actions involving land use designations are *per se* unsuitable for resolution by summary judgment. The Ninth Circuit has recently admonished that summary dismissals must be viewed with "particular skepticism" in cases involving inverse condemnation, because a court must often resort to "essentially ad hoc factual inquiries" to determine whether compensation is due. *Hall v. City of Santa Barbara*, No. 85-5838, slip op. at 6-7 (9th Cir. Aug. 22, 1986). Nevertheless, such a disposition "is not always inappropriate." *Id.* at 7. There is no special summary judgment standard for inverse condemnation cases. If the City can show the absence of any genuine and material disputes of fact such that plaintiffs, as a matter of law, are not entitled to prevail, this court must grant its motions for summary judgment.

II

DOES KAISER HAVE A PROTECTABLE PROPERTY INTEREST?

The City argues that Kaiser does not have a property interest that is protected by the Fifth Amendment. Kaiser merely has a contract, which although it concerns land, does not give any constitutionally-protected property rights. The City, if it has harmed Kaiser at all, has merely frustrated Kaiser's contract, but it has not "taken" any property.

In determining whether Kaiser has a property interest that is entitled to protection under the federal constitution, federal courts are not bound by state law. However, federal courts look to state law for aid in determining the scope of property interests. *United States v. 3,035.73 Acres of Land*, 650 F.2d 938, 939-40 (8th Cir. 1981); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). In this case, the development agreement itself, decisions by the Hawaii Supreme Court, and federal law all support the City's argument that Kaiser has no protectable property interest.

A. *Development Agreement*

The contours defining "property" are not always clear. The term is used to describe not only a tangible physical thing, but also "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Kaiser argues that there is a trend to allow compensation for any valuable interest, in accordance with fairness and justice, and that the development agreement has given it a "bundle of rights" sufficient to afford it a legally enforceable property interest. These rights, it asserts, include the exclusive right to develop the property, possession of the property, and the right to dispose of the property. Kaiser also asserts that its interest in Queen's Beach has "vested" since it has "selected" Queen's Beach and since it

has expended millions of dollars in infrastructure improvement in preparation for development.

A close look at the development agreement shows that Kaiser and Bishop have set up a means by which Bishop can make money from the development of Hawaii Kai without incurring any indebtedness itself. Under the agreement, Bishop owns the land. Kaiser has the "exclusive right," i.e. the first right, to subdivide, develop, and improve the land at its own expense and risk. The agreement specifies that Kaiser has the priority right to lease land to build the first hotel at Hawaii Kai.

Bishop allows Kaiser to access the land, insofar as is necessary for preliminary development and inspection. Kaiser has the right to "select" tracts of land for development. After it has selected tracts, Kaiser prepares subdivision maps and plans, to be approved by Bishop and governmental agencies. After the necessary approvals, Kaiser shall develop the tract in keeping with the plan and shall obtain any necessary approvals.

On the completion of a development, Kaiser is to find lessees for the lots in the tracts. Bishop remains the land owner and the lessor. Bishop executes the leases.

Kaiser recovers its investment, plus a profit for its effort and risk, from lot development payments and rental proceeds, and Bishop receives rentals for the land which Kaiser improves.[7]

---

7 The Development Agreement also provides, *inter alia*, that:

Bishop is not to lease, transfer, etc. any land without Kaiser's consent. However, if Kaiser does not commence lot development within six months after selecting a tract, Bishop may lease the lot or lots to someone else.

Kaiser may assign or sublet its leased lots or the right to lease the property, with the approval of Bishop.

At the expiration of the agreement, Kaiser shall complete development in selected tracts, but any and all rights in non-selected land cease. Bishop shall try to make arrangements with future lessees to recoup Kaiser's improvement costs.

(*Footnote continued on next page*)

Kaiser's assertions misconstrue the development agreement. For example, Kaiser does not "possess" the land. Bishop owns the land and remains the landowner and lessor of Kaiser's completed developments; Kaiser has a right of access for development purposes. Nor does Kaiser have the right to "dispose" of the property. At most, it may assign or sublet lots it has leased from Bishop, with Bishop's consent or approval. Nor does Kaiser have any "vested rights" in the Queen's Beach property. Both the development agreement and a subsequent arbitration decision make clear that Kaiser has the right, but not the obligation, to develop property in Hawaii Kai at its own expense and risk.

In addition, Kaiser has not invested any money specifically in Queen's Beach. Even assuming that costs Kaiser has invested in infrastructure elsewhere in Hawaii Kai can be properly allocated to the anticipated development, this investment represents a business risk undertaken by Kaiser. Kaiser cannot turn a contract right into a property right simply by investing in the subject matter of the contract. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1275-76 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *see also infra* II.C.

Finally, the very terms of the agreement explicitly state that Kaiser is to have no interest in the lands other than that of a lessee in the lands it leases. Article R of the Development Agreement, describing the relationship between the parties, states:

> This Agreement shall not be construed as creating the relationship of principal and agent between BISHOP and [KAISER], nor as creating a partnership, join venture, or association of any kind between BISHOP and [KAISER], it being the purpose and intent hereof to create only a contract relationship between BISHOP as landowner and [KAISER] as an independent contractor

---

If any of the land is condemned, Kaiser is entitled to an apportionment for the value of any buildings or other structures on the land and for costs incurred on land that had not yet been leased.

> to subdivide, develop and improve The Land. It is contemplated that BISHOP as landowner will issue leases as lessor to the public, and to the extent that [KAISER] takes leases under and pursuant hereto, there shall be the relationship of lessor on the part of BISHOP and of lessee on the part of [KAISER], but not otherwise.

Similarly, Section F-15 stresses that Bishop is to have all the rights of a lessor under leases made under the agreement, that Bishop remains the owner of leased lots, and that Kaiser "shall have no interest" in leased lots other than those it may acquire as a lessee of particular lots. And in this regard, it should be noted that Kaiser has not even leased Queen's Beach.

In summary, the development agreement affords Kaiser the business opportunity to develop land at Hawaii Kai, including the priority right to lease land to build the first hotel. However, the agreement does not give Kaiser any protectable interest in the property it develops.

B. *State Interpretations of the Development Agreement*

The Supreme Court of Hawaii has had three separate occasions to analyze the respective interests of Kaiser and Bishop under their development agreement. The court has thrice determined that the agreement gives Kaiser no property interests.

In *In re Tax Appeal of Kaiser Hawaii-Kai Development Co.*, 52 Hawaii 623 (1971), the court considered the nature of leased lot payments for tax purposes. The lower court had determined that Bishop and Kaiser had a joint ownership interest in lease rentals received by Bishop. The supreme court however analyzed the development agreement and determined that Kaiser was an independent contractor, not a co-lessor, and had no interest in the lands. Bishop alone, as the exclusive owner and lessor, was entitled to rental payments, but under the agreement, Kaiser derived some money from the lot payments as Bishop's *quid pro quo* for Kaiser's contractual services. The court noted that these facts, as

spelled out in the development agreement, "are not changed by Bishop and Hawaii Kai agreeing to deem them to be otherwise." 52 Hawaii at 627. Thus the court held that Kaiser was required to pay general excise tax on the rental proceeds as gross receipts derived by it from its contracting business.

In another case involving real property taxes, the court again examined the agreement and found that Bishop remains the lessor of developed lots, retains "rights in respect of matters which have to be approved by it, or as to which mutual agreement has to be reached, and does not relinquish control over the land." *Kaiser Hawaii Kai Development Co. v. Murray*, 49 Hawaii 214, 226, 412 P.2d 925 (1966).

Finally, Kaiser argues that the Hawaii legislature has recognized that a developer, pursuant to a development agreement, has a compensable interest. The Hawaii Land Reform Act, Hawaii Rev. Stat. § 516-26, provides that if the Hawaii Housing Authority condemns land, the fee owner, lessor, and all legal and equitable owners share in the compensation. A developer may also share in the compensation to the extent of his interest as may be determined by agreement. Kaiser asserts that this recognizes its property interest in the land. The Hawaii Supreme Court, however, in a case involving Hawaii Kai, Bishop, and Kaiser, has recently precluded this argument. In *Hawaii Housing Authority v. Lyman*, 68 Hawaii 54 (1985), the court stressed that Kaiser has no equitable interests in any parcels of lands, and that its rights are defined by the development agreement. Kaiser's rights to any proceeds of the award "necessarily derive from those of [Bishop Estate], since such rights, if they do exist, stem from the development agreement contract." 68 Hawaii at 77.

In short, the Hawaii Supreme Court has consistently refused to recognize Kaiser's asserted property interest, and the state court's interpretation is entitled to considerable deference in this matter.

C. *Distinction Between Contract and Property Rights for an Inverse Condemnation Analysis*

The constitutional takings analysis has long distinguished between mere contract rights, which are not compensable, and a property interest, which is subject to Fifth and Fourteenth Amendment protection. This distinction has been well developed in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and its progeny.

In *Omnia*, the plaintiff owned a contract which gave it the right to purchase steel plate from a steel company at a price below market. The government requisitioned the steel company's entire production of steel plate for the year and ordered the company not to comply with the contract. The plaintiff alleged a taking. The Court, however, held that there had been no taking. In order for there to be a taking of the contract itself, the government must acquire the obligation or the right to enforce it. The government had taken the *subject matter* of the contract, and the plaintiff had merely suffered a *consequential* loss resulting from lawful government action. The Court noted that the performance of the contract was rendered impossible and that it had not been appropriated, but ended. 261 U.S. at 510-11.

T.O.F.C., Inc. v. United States, 683 F.2d 389 (Ct. Cl. 1982), similarly makes the distinction between property and contract rights. In this case, Erie Railroad and T.O.F.C. built facilities for a piggyback loading terminal. Erie took title to the land, and T.O.F.C. was given an exclusive right to operate the facilities. Erie also agreed to pay T.O.F.C. to reimburse it for its investment in the terminals. Erie went bankrupt, and Conrail took over the property but refused to continue the contract with T.O.F.C. T.O.F.C. argued that it had a property interest that had been taken, but the court held, under *Omnia* that there had been no taking. Erie had owned the land and facilities—T.O.F.C. had essentially had only a service contract for an exclusive right to operate the facility. The court held that the Fifth Amendment compensated only for direct appropriation of property, not for con-

sequential injuries resulting from the lawful exercise of government power. 683 F.2d at 395.

In *PVM Redwood Co. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983), the Ninth Circuit held that PVM had failed to distinguish between "appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power." 686 F.2d at 1329, *quoting United States v. Grand River Dam Authority*, 363 U.S. 229, 236 (1960). PVM operated a sawmill and had alleged that after the passage of the Redwood Park Expansion Act, their redwood suppliers could no longer furnish their needs, causing them an increase in production costs. The court held that what had been frustrated was an expectancy based on past experience that contracts would be entered into.

The City cites numerous other cases making this property/contract distinction and stresses that the nature of Kaiser's contract relationship to the property controls the issue. As this court has determined above, Kaiser holds merely the contractual right to construct improvements on the land at Hawaii Kai, including Queen's Beach, and has no separate interest in the property itself. The City's actions may have frustrated the contract between Bishop and Kaiser, but the City has not "taken" any protectable property from Kaiser.[8]

---

8 Kaiser cites cases which stand for the proposition that valid contracts are property, and that the taking of a contract requires just compensation. This proposition cannot be disputed. However, in the cited cases, the government had either appropriated the contract itself or had otherwise altered the contract itself. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579 (1934) (federal government repealed legislation providing for plaintiff's insurance policy); *Larinoff v. United States*, 533 F.2d 1167, 1179-80 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977) (federal government repealed legislation providing for reenlistment bonus); *Hall v. Wisconsin*, 103 U.S. 5 (1880) (state repealed legislation under which plaintiff had contract for services). Thus, these cases are inapplicable to our situation, which involves a taking of the subject matter of the contract.

Kaiser also argues, citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), that its development rights are an integral part of the property taken, and thus are compensable. *Monongahela* involved the value

C. *Does Kaiser Have an Options Contract that Represents a Compensable Property Interest?*

Kaiser asserts, in the alternative, that it has an option to lease Queen's Beach for the purpose of constructing the first hotel,[9] and that this option is a compensable property interest in a condemnation proceeding.

While the general rule is that an option is merely a contract and noncompensable in condemnation,[10] Kaiser argues that there is a significant "trend" toward recognizing an option as a property interest. In the leading case on this issue, *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975), the California Supreme Court reasoned:

> Important changes have occurred in eminent domain law weakening the legal foundation of the Court of Appeal cases denying recovery to the optionee and eroding their authority. [These cases] turned on application of the so-called "property interest-contractual right" test which in turn depended on common law concepts of property. . . .
>
> We do not dispute the technical correctness of the . . . conclusion that—applying traditional common law concepts of property—the option creates in the optionee

---

to be paid for condemnation of a series of navigation dams and locks. The Court held that the value should include both the tangible property and an amount for the franchise owned by the company to collect tolls, because the franchise was "not merely a contract in respect of the property taken, but was an integral part of it . . . ." *Omnia*, 261 U.S. at 513 (distinguishing *Monongahela*). This case is inapposite, however, as recognized by the Court in *Omnia*, since the government had taken the tangible property of the plaintiff.

9 In the event Kaiser takes such a lease, the development agreement specifies an applicable rental formula of a percentage of gross income from the hotel.

10 *See, e.g.*, 27 Am. Jur. 2d *Eminent Domain* § 255 (1966 and Supp. 1985); annot., 85 ALR2d 588 (1962).

> no estate as such in the land. However, this test is no longer conclusive.
>
> Recent decisions, both of this and of the federal courts, have held the property-contract labelling process is not necessarily determinative in questions of due process compensation. Instead, compensation issues should be decided on considerations of fairness and public policy. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law." "[T]he right to compensation is to be determined by whether the condemnation has deprived claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."

119 Cal. Rptr. at 494-95 (citations and emphasis omitted).

The court then examined the expectations of the parties and determined that the optionor had no reasonable expectations of receiving a greater purchase price than the option, and that the optionee expected the benefit of his bargain—that is, to receive any value in excess of the purchase price. The share to the optionee then, should be the excess, if any, of the condemnation award over the purchase price. The court also noted the public policy interests favoring option arrangements.

Hawaii has never directly addressed this issue; however, federal courts in this state have indicated skepticism that Hawaii would recognize an option as a protectable interest.[11] Moreover, the cases cited by Kaiser in support of its position only recognize that *certain* options are compensable.[12] No

---

11 In *Windward Partners v. Ariyoshi*, 693 F.2d 928, 929 (1982), *cert. denied*, 461 U.S. 906 (1983), the Ninth Circuit noted in passing: "In any event, Hawaii courts have never recognized an option as a compensable property interest." Similarly, in *In re Continental Properties, Inc.*, 15 Bankr. 732 (Bankr. D. Hawaii 1981), the court held that an option conveys no equitable interest in land.

12 Most of the cited cases concern either options to renew held by a lessee in possession, *e.g.*, *Sholom, Inc. v. State Roads Commission*, 246 Md.

jurisdiction has addressed the question whether a bare unexercised option to lease property, which Kaiser asserts that it has, is a compensable property interest.

The most fundamental problem in Kaiser's argument, however, is whether Kaiser has an option at all. This court tends to agree with the City that Kaiser has no option, but merely a right of first refusal.

An option to purchase is a contract whereby the owner of the property, for valuable consideration, sells the optionee the right to buy a specified property, for a specified price, within a specified time, and on the terms in the option. The option holder thus may perform or not perform the conditions at his option, has the power to force conveyance of the land, has immunity from revocation or repudiation by the optionor, and may enforce these rights in court. If options contracts do not actually provide the holder with an interest in the land, they do provide considerable value on which the holder can rely. *E.g.*, *Spokane School District v. Parzybok*, 96 Wash. 2d 95, 633 P.2d 1324, 1328 (1981).

The *Spokane* court was careful to stress that "[n]ot every option to purchase is necessarily of sufficient value and substance to entitle the holder to participate in a condemnation award." 633 P.2d at 1329. The court noted that here, the option was contained in a lease covenant, there was every reason to suppose the option would be exercised, the property had increased in value, and the optionee had suffered a definitely measurable loss.

Further, the *Spokane* court and others have recognized that a preemptive right of first refusal creates no interest in property and gives far less than does an options contract.

688, 229 A.2d 576 (1967); *State ex rel. Morrison v. Carlson*, 83 Ariz. 363, 321 P.2d 1025 (1958); *Department of Public Works and Buildings v. Bohne*, 415 Ill. 253, 113 N.E.2d 319 (1953), or options to purchase, *e.g.*, *Nicholson v. Weaver*, 194 F.2d 804 (9th Cir. 1952); *Spokane School District v. Parzybok*, 96 Wash. 2d 95, 633 P.2d 1324 (1981); *Texaco, Inc. v. Commissioner of Transportation*, 34 Conn. Supp. 194, 383 A.2d 1060 (Conn. Super. Ct. 1977); *Sholom, Inc. v. State Roads Commission*, 246 Md. 688, 229 A.2d 576 (1967); *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975).

Whereas the option contract gives the power to compel sale, the right of first refusal merely requires the owner to offer it to the holder first, if he decides to sell at all. Thus, one who holds a right of first refusal would not necessarily be entitled to share in a condemnation award. 633 P.2d at 1329, *citing Robroy Land Co. v. Prather*, 95 Wash. 2d 66, 622 P.2d 367 (1980). *See also City of Ashland v. Kittle*, 347 S.W.2d 522 (Ky. 1961) (mere right of first refusal not a compensable interest).

Turning to the development agreement, Kaiser's interest is more like a right of first refusal than an option to lease. The provision states that Kaiser "shall have the priority right to lease one or more lots for the purpose of constructing the first hotel on the land." The agreement does not give Kaiser the right to compel Bishop to lease a particular piece of property; it is not clear that there was valuable consideration given; and the City points out that Kaiser did not even have a concrete expectation of a leasehold for developing a hotel at Queen's Beach, since the area had never been zoned for resort development.

E. *Conclusion*

In conclusion, this issue is proper for summary judgment, since there are no triable issues of fact involved in the interpretation of the development agreement between Kaiser and Bishop. I agree with the courts of this state that the development agreement does not give Kaiser a constitutionally-protected interest in Queen's Beach. I also find that Kaiser does not have an option contract with Bishop, but that even if Kaiser had an option, there is no indication that the Hawaii courts would find it a compensable interest. In short, Kaiser merely has a contract to develop land as a business risk, which has been frustrated, but not taken, by the City's zoning actions.[13]

---

13 Because I find that Kaiser has no property interest at Queen's Beach, I need not address the City's argument that Kaiser lacks standing because it has not been injured by the City's actions. However, even if Kaiser did have

III

DEPRIVATION OF "VESTED" PROPERTY RIGHTS

Kaiser and Bishop allege that they have been denied due process in that they have been deprived their "vested property rights to develop Queen's Beach pursuant to the 1966 DLUM agreement and the City land use regulations prior to 1982." As Bishop states the allegation: "The City first breached and then attempted by passage of restrictive land use regulations to impair its agreement to allow development at Queen's Beach in accordance with the 1966 DLUM."

This claim is without merit; plaintiffs have no property rights pursuant to the DLUM or other zoning regulations. First, the DLUM was not a zoning ordinance and did not have the effect of a zoning ordinance. The DLUM was merely a detailed map to implement the general plan. *Nuuanu Neighborhood Association v. Department of Land Utilization*, 63 Hawaii 444, 630 P.2d 107 (1981); Honolulu City and County Ordinance No. 4517 (June 18, 1975).

Furthermore, zoning ordinances do not amount to contracts with developers. Courts have held, in light of the broad principle that municipalities cannot barter away their legislative or police power, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977); *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983), *aff'd*, 740 F.2d 961 (4th Cir. 1984), that municipalities cannot bind themselves with regard to future zoning or other legislative decisions. *E.g., Beckman v. Teaneck Township*, 6 N.J. 530, 79 A.2d 301 (1951); *Louisville v. Fiscal Court of Jefferson County*, 623 S.W.2d 219, 224 (Ky. 1981); *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835, 843 (1972).

Developers may sometimes succeed, however, on a theory of zoning estoppel. *County of Kauai v. Pacific Standard Life*

---

a property interest at Queen's Beach, summary judgment would have to be granted against Kaiser on all issues for which it is granted against Bishop. Kaiser's and Bishop's complaints are nearly identical. Except for the fundamental distinction between their property rights, every conclusion in this opinion applies equally to Kaiser as to Bishop.

Insurance Co., 65 Hawaii 318 (1982), delineates the standards which a developer must meet in order to claim a vested right to a particular land use under an estoppel theory:

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

65 Hawaii at 327, quoting *Life of the Land v. City Council*, 61 Hawaii 390, 453 (1980).

The *County of Kauai* court held that the "final discretionary action" on the specific project constitutes the "official assurance" for zoning estoppel purposes. 65 Hawaii at 328. In that case, the developers had secured resort zoning; however, after the zoning code had been amended, a citizens' group succeeded in getting the issue on a referendum ballot. Meanwhile, the developer obtained a special management area permit and building permits, and had spent considerable money. The court held that the last discretionary act was the special management area permit, but that the certification of the referendum nullified the effect of that permit and the building permits, and thus that the developer had had no right to rely on those permits.

In our case, Bishop and Kaiser *never even had the proper zoning in place for their resort development*. Thus, Bishop and Kaiser's claim that they had a vested right to assurances that they could develop at Queen's Beach must fail.[14]

---

14 Bishop appears to misunderstand the limited scope of the City's assertion on this issue. In its memorandum in opposition to summary judgment, Bishop spends considerable time arguing that it need not establish "vested rights" as a precondition to recovery under either their overregulation or inequitable precondemnation activities theories. The City merely argues, and I so hold, that Bishop and Kaiser have no "contract" with the

IV

RIPENESS

The City argues that plaintiffs' claims are not ripe for review. I agree that plaintiffs have failed to meet either of the finality requirements imposed by the recent Supreme Court cases of *Williamson County Regional Planning Commission v. Hamilton Bank*, 105 S. Ct. 3108 (1985) and *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986).

In *Williamson County*, the Supreme Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 105 S. Ct. at 3117. The Court reasoned that it is simply impossible to evaluate the economic impact of the regulations and the extent to which they interfered with reasonable investment-backed expectations until the administrative agency has made a final definitive determination on how it will apply the regulations at issue to the particular land in question. *Id.* at 3119.[15]

City under the DLUM such that they have a right to develop at Queen's Beach. This does not dispose of their more general takings claims, however. That is, they do not necessarily have to show that they have received the last discretionary assurance in order to make out a potential constitutional takings claim.

15 Bishop argues that this finality argument does not apply to its claims under § 1983 because they need not exhaust administrative remedies. The Supreme Court rejected this argument in *Williamson County*, however, explaining that exhaustion and finality were conceptually distinct:

> While the policies underlying the two concepts often overlaps the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

105 S. Ct. at 3120.

Thus, claims under § 1983 must also meet the Court's finality requirements.

In addition, the Court held that a taking claim is not ripe until a plaintiff has sought compensation through state procedures. The Court reasoned that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 3121. The burden is on the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Id.* at 3122.[16]

In June, the Supreme Court reaffirmed the principles of the *Williamson County* case in *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986). In this case, a majority of the Court again avoided the issue of whether a monetary remedy is constitutionally required in inverse condemnation cases involving regulatory takings by holding the claim unripe for review. Reaffirming the principles of *Williamson County*, the Court held that it was unable to determine whether a taking had in fact occurred. Although the developer's initial proposal had been rejected, he had not received a "final definitive position" from the zoning board, leaving open the possibility that some development would be permitted. 106 S. Ct. at 2568. The Court stressed that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 2569 n.9.[17]

---

16 The Court held these principles equally applicable whether the claim for inverse condemnation was asserted under the Fifth Amendment Just Compensation Clause or under the Fourteenth Amendment Due Process Clause, *see supra* note 5, because, under either theory, it would be impossible to determine if a regulation had gone "too far" until a final decision was made as to how the regulations would apply to the particular property. 105 S. Ct. at 3122-24.

17 The facts in both *Williamson County* and *Yolo County* are instructive for comparison to plaintiffs' position in this case. In *Williamson County*, the plaintiff developer had obtained the planning commission's approval of a preliminary plat for development of a tract based on a 1973 cluster zoning ordinance. Thereupon, the developer spent $3.5 million on a golf course and sewer lines. He then submitted a final plat for approval, sev-

A. *Plaintiffs Have Not Met Received a "Final Determination" on Development at Queen's Beach.*

The City argues that plaintiffs have not met either of the *Williamson County* thresholds. First, they assert that plain-

---

eral sections of which were given final approval by 1979. The preliminary plat was also reapproved four times during 1973 to 1979. In 1977, the county changed the density limits in the zoning codes; however, the county decided to continue to apply the 1973 zoning regulations to the developer's project and reapproved the preliminary plat in 1978. In 1979, the commission changed its mind and decided to apply the 1977 regulations to the developer's project and asked the developer to submit another plat for approval. The commission denied the approval for numerous reasons. Thereupon, the developer appealed to the zoning board of appeals which determined that the 1973 rules should have been applied. The developer resubmitted the earlier approved preliminary plat, but the commission declined to follow the decision of the appeals board and disapproved the plat for eight different reasons. The developer then filed suit under § 1983 alleging a taking and asserting that the commission should be estopped from denying approval.

The Supreme Court held that the developer's claims were not ripe. The developer had submitted a development plan, which the Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), had held was necessary for a challenge to the application of a zoning ordinance. However, the developer had not sought variances that might have allowed it to develop its property according to its proposed plat, notwithstanding the commission's finding that the proposal did not conform to the zoning ordinance. The Court noted that the record showed that variances could have been granted for at least several of the violations, and that absent a finding as to *all eight* of the objections, it would be impossible to tell whether the land retained any beneficial use.

The developer argued that it had done "everything possible" to resolve the dispute with the commission, and that the commission's denial of approval was tantamount to a denial of the variances. But the Court was not moved, stating that there was no evidence that the developer had filed for a written request for variances.

The Court also held the developer's claim unripe because he had not sought compensation, or shown that the procedure was unavailable or inadequate, under Tennessee laws that authorized inverse condemnation actions in certain circumstances.

In *Yolo County*, plaintiff sought to subdivide and develop a cornfield, which was zoned for residential use. The developer in this case had submitted a tentative subdivision map to the county planning commission, which the commission rejected because it did not adequately provide for access, sewers, police protection, and water services.

(*Footnote continued on next page*)

tiffs have not met the "final definitive position" prong: They have not submitted a development plan under the present land use regulations, which list at least twenty possible uses

---

Plaintiff filed suit, accusing the county of effectively restricting the property to open-space agricultural use, despite its zoning, by denying all permit applications and other requests to implement any other use. Plaintiff specifically alleged that none of the beneficial uses allowed even for agricultural land would be suitable for his property, and that any application for a zone change, variance, or other relief would be futile.

The California Superior Court sustained the County's demurrer, finding that the complaint failed to state a cause of action. The court found that, even if the property was restricted to agricultural uses, this did not preclude all development, and beneficial use could be made of the property, such as ranching and farming. Alternatively, the court held that no monetary damages could be awarded for inverse condemnation.

The California Court of Appeals affirmed the trial court on both grounds. In discussing the failure of the complaint to state a cause of action, the court explained:

> Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action.

106 S. Ct. at 2565 (quoting California Court of Appeals opinion).

The Court noted that the findings of both lower courts that there was "no total prohibition against the productive use" of the land left open the possibility that some development might be permitted. *Id.* at 2568 & n.8. Thus, plaintiff had not received a final definitive determination from the zoning board, and the Court was unable to determine whether a taking had occurred.

In addition, the court noted that the lower courts' findings conflicted with plaintiff's allegations that "any beneficial use" is precluded and that future applications would be futile. The Court implied that although futile reapplications for approval were not necessary, a developer had to at least make a meaningful application before a court could determine whether there had been a taking. *Id.* at 2568 n.8.

for the land; they have not applied for a variance; they have not applied for a zoning change.

Plaintiffs counter that they have already received several final rejections of their efforts at Queen's Beach, that they should not be required to beat their heads against a stone wall, and that all further efforts would be futile.[18]

---

18 Plaintiffs cite *Kinzli v. City of Santa Cruz*, 539 F. Supp. 887 (N.D. Cal. 1982), a pre-*Williamson County* case. In this case, plaintiff sought to develop her land for residential purposes, but delayed the building relying on certain representations by the city. Then the city passed an open space ordinance, and told the plaintiff several times that "no viable private development proposal" would receive city approval and that any application to the city to improve the property would be futile. Plaintiffs alleged that the ordinance permitted no viable economic uses, and that the city had acted intentionally to prohibit all feasible private uses of the land and to maintain it as open space for the public without compensating the fee owner plaintiff. The court held that the claim was ripe because if, as plaintiff had alleged, further applications would be futile, the problems of prematurity and abstractness would be eliminated.

I am not sure, however, that this case would be decided similarly today after *Williamson County* and *Yolo County*, which require a more concrete showing that a final determination has been reached. For example, under the open space ordinance at issue in the case, numerous uses were allowable if a special use permit had been obtained. Under the Court's recent cases, it would seem necessary to see what type of uses remained for the plaintiff's land before a court could evaluate the taking issue.

I admit, though, that these two cases have made the takings inquiry even more complex, since it is difficult to determine when enough is enough, and the property owner can finally come before a court with his claim. Justice White, in his dissent in *Yolo*, bitterly complained that

> [n]othing in our cases . . . suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.

106 S. Ct. at 2571.

Justice White, joined by three other members of the Court, saw "no reason for importing such a requirement" into the "final decision" analysis; nor would he require landowners to apply for less intensive development. For example, he would find that a "final decision barring all development" had been made

> if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the

(*Footnote continued on next page*)

The record shows that plaintiffs have been involved in an ongoing attempt to develop Queen's Beach as a resort.[19] The

---

> governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, . . . even though the landowner did not apply for a less intensive development. Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.

Id. at 2572.

Plaintiffs argue that they have received denials of their Queen's Beach project and that they need not make any more fruitless attempts to secure approval. Perhaps Justice White would find that a final decision had indeed been made at Queen's Beach (although it should be noted that plaintiffs' proposed project here is not consistent with the present zoning at Queen's Beach). Nevertheless, Justice White's comments do not represent the present state of the law.

I note that I am not the first judge to have difficulty applying the *Williamson County* doctrine. *See, e.g., HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985). As I have often done in the past, however, I am following the wisdom of Lord Denning who wrote:

> Seek to make your opinions clear at all costs. Make them positive and definite. Not neutral or vacillating. My pupil master told me early on of the client's complaint: "I want your opinion and not your doubts," and of Sir George Jessel's characteristic saying: "I may be wrong and sometimes am, but I am never in doubt."

Lord Denning, *Lord Denning on the Discipline of Law* 7 (1979).

The record shows the following efforts by Kaiser in connection with Queen's Beach:

> In 1971, Kaiser applied to change the zoning from residential to resort/commercial, but subsequently withdrew the request. Aff. of Okuda.
>
> In 1981, Kaiser participated in drafting a compromise Development Plan for East Honolulu, which would allow mixed residential and commercial uses at Hawaii Kai. This version was adopted by the city council but vetoed by the mayor. In February and March 1983, Kaiser again suggested resort designation for Queen's Beach in the the Development Plan, but in April 1983, the city council finally enacted the Development Plan, designating Queen's Beach for park and preservation uses. Aff. of Okuda.
>
> In February 1983, Kaiser applied for a residential subdivision at Queen's Beach, which was in conformity with the then existing R-6 zoning. This application was denied on May 19, 1983 after the passage

majority of their activity, however, has been attempts to influence the drafting of the East Honolulu Development Plan and amendments thereto. Plaintiffs have made only two specific applications for zone change or development at Queen's Beach—one in 1971, which they did not follow through on, and one in 1983, which was denied following the adoption of the East Honolulu Development Plan. Plaintiffs have made no attempt to apply for development permits, zoning changes, or variances at Queen's Beach under its present zoning.

Bishop and Kaiser appear to misunderstand the crucial rationale of the finality requirement: The court simply cannot evaluate a regulatory takings claim until plaintiffs have received "a final and authoritative determination of the *type and intensity of development legally permitted on the subject property.*" *Yolo County*, 106 S. Ct. at 2566 (emphasis added). The present P-1 zoning allows many potentially profitable uses.[20] Plaintiffs have made no meaningful application to determine what uses or combinations of uses might be approved at Queen's Beach. As *Agins v. Tiburon*, *Williamson County*, and *Yolo County* make clear, there is, as yet, simply no "concrete controversy regarding the application of the specific zoning provisions." *Agins*, 447 U.S. 255, 260 (1960).

Further, plaintiffs have made no attempt to alter their vision of a large hotel complex at Queen's Beach. Rejection of plaintiffs' "exceedingly grandiose development plans" at

---

on May 10, 1983 of the East Honolulu Development Plan which designated the area "preservation." Aff. of Fujimoto; aff. of Whalen.

In 1985, in exploring possible settlement of this action, Kaiser put together a new land use plan for its resort at Queen's Beach. Kaiser submitted it as a proposed amendment to the Development Plan. However, in November 1985, the city managing director indicated that the city would reject the proposed plan, primarily because of the pending lawsuit. In December, the chief planning officer rejected the development plan amendment, and in March 1986, the planning commission voted 5-0 against the amendment. Aff. of Davidson.

20 *See supra* note 4.

Queen's Beach does not necessarily mean that the land has no reasonable beneficial uses left or that plaintiffs have been denied all reasonable economic value from their land. *Yolo County*, 106 S. Ct. at 2569 n.9.[21]

Finally, as the Supreme Court has made clear, mere allegations or opinions by the developer that it has "done everything possible" or that requests for a variance or other relief would be futile will not suffice. *Williamson County*, 105 S. Ct. at 3118, 3120-21; *cf. Yolo County*, 106 S. Ct. at 2564, 2568 n.8.

B. *Plaintiffs Have Not Sought State Compensation.*

The City also asserts that Kaiser has not met the second prong of the *Williamson County* finality doctrine. That is, Kaiser has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate. 105 S. Ct. at 3122.

On this issue, plaintiffs argue, citing *Allen v. City and County of Honolulu*, 58 Hawaii 432 (1977), that Hawaii does not allow damages for inverse condemnation. However, *Allen* concerned compensation for zoning estoppel and not regulatory takings. While *Allen* indicates that the state court might generally look on damages for development costs with disfavor, it does not necessarily preclude compensation for Bish-

---

21 Kaiser submitted the affidavit of a Mr. William Wanket, who concluded that the following uses had a "reasonable probability of approval" at Queen's Beach: agriculture, private riding academies, private recreation camps, private golf course, cemetery, private utilities, and aquaculture. His opinions, however, including his determination that private vacation cabins would not be allowed, cannot substitute for an explicit determination from the zoning board or the Department of Land Utilization.

In addition, Kaiser submitted an affidavit from a Mr. William Dornbush, who concluded that none of the P-1 zoning uses are economically viable at Queen's Beach. The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

op's and Kaiser's claims. Accordingly, until the state has denied them compensation, or until plaintiffs otherwise demonstrate that state compensation is unavailable or inadequate, plaintiffs' claims are not ripe for review by a federal court in a takings action.[22]

C. *Finality Requirements Do Not Bar Plaintiffs' Claims for Inequitable Precondemnation Activity.*

Plaintiffs argue that even if their overregulation claim is barred as unripe, this court must still consider their claim for inequitable precondemnation activity. I agree.

Williamson County and *Yolo County* stress that it is impossible for a court to determine whether a particular zoning regulation works a taking when applied to a particular piece of property until a final determination has been made of the various uses that can be made of the property. This is because the takings inquiry examines whether there is any reasonable economic value left to the property at issue. An analysis of beneficial uses is irrelevant, however, to a claim for inequitable precondemnation activities.

In *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983), the Ninth Circuit held that the failure to submit a development plan did not bar a claim that unreasonable delays or other unreasonable conduct in the condemnation process effectively resulted in a taking.[23] Thus Bishop may proceed

---

22 The Eighth Circuit has recently reached a similar conclusion. In *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986), the court held, following *Williamson County*, that plaintiff's takings claim was not ripe because it had not sought compensation from the state. Plaintiff had argued that a state supreme court case barred recovery for inverse condemnation. However, the Eighth Circuit held that the state court's holding merely limited the use of inverse condemnation damages to cases where injunctive relief would be inadequate. Thus the state court decision did not foreclose such an action. Until the state court had ruled that an inverse condemnation action could not be brought or had denied them compensation, the plaintiff's claim was not ripe for review by a federal court.

23 While *Martino* was decided prior to *Williamson County* and *Yolo County*, its rationale still applies. The Ninth Circuit's decision was grounded

with its allegations that the City's conduct concerning Queen's Beach was "so unreasonable as to result in 'planning blight' for which [they] may be entitled to compensation." *Id.*

V

SUBSTANTIVE DUE PROCESS

Bishop and Kaiser appear to argue that the zoning laws on their face violate their rights to substantive due process.[24] The test for substantive due process in analyzing social and economic regulations, such as the zoning regulations at issue here, is whether the regulations are rationally related to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955). The zoning carries with it a "presumption of rationality that can only be overcome by a clear showing or arbitrariness and irrationality." *Hodel v. Indiana*, 452

---

in *Agins*, which held plaintiff's taking claim premature for failure to submit a development plan. Like the Court's more recent pronouncements, *Agins* requires a concrete determination of uses so that a court may assess the reasonable value of the property under the regulations.

24 *Yolo County* and *Williamson County* focused on whether zoning regulations *as applied* to a particular parcel constituted a taking either under the Fifth Amendment or as an abuse of police power that violated the Fourteenth Amendment guaranty of due process. These cases do not preclude a claim that the regulations are arbitrary and capricious and thus that the regulations themselves violate due process.

At first blush, it might appear that Kaiser would have standing to challenge the regulations on their face, under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In that case, the plaintiff, a non-profit developer, contracted to build low-income housing on land owned by a religious order. Under their agreement, the developer became the immediate lessee and in addition had a contract of sale contingent on securing zoning clearances. The Court held that the plaintiff had standing to assert due process rights even though it was not the property owner. By contrast, both the development agreement between Kaiser and Bishop, and state court decisions make clear that Kaiser merely has a contractual development interest and no property interest. Kaiser has not even acquired the interests of a lessee at Queen's Beach.

U.S. 314, 331-32 (1981). This court is neither a super legislature, nor a zoning board of appeal, and it is not my function to pass on the wisdom or appropriateness of the regulations. *See Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

This court must give considerable deference to the interests pursued by the legislature in passing zoning laws. Zoning ordinances must be upheld unless they are "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Courts have given legislatures wide latitude in defining what is best for the community. Thus the legislature, under the guise of the "general welfare" may pass ordinances to preserve spiritual, physical, and aesthetic values, *Berman v. Parker*, 348 U.S. 26, 33 (1954), to "enhance the quality of life," *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978), and to create zones where "the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

The City has supplied a substantial analytical report prepared by Michael Fischer, of Sedway, Cook & Associates, a planning firm, that concludes that the general plan, development plans, and the zoning, both in general and as applied at Queen's Beach, "bear a substantial relation to and rationally seek to promote the health, safety, and general welfare" of the people of Honolulu.

Bishop has not submitted any evidence to the contrary, but instead argues that the report is self-serving and that the issue of the legislative goals must be resolved on a more complete factual record, *e.g.*, on the basis of actual testimony or legislative reports and findings as to the need for the legislation.

Although a more complete legislative record would help this court to determine the legislative concerns, the absence of such material does not preclude my finding that the zoning regulations affecting Queen's Beach are rationally tied to a valid goal. *See, e.g., Rogin v. Bensalem Township*, 616 F.2d

680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (holding that the complaint does not state a cause of action for denial of due process or equal protection). My inquiry, under the extremely deferential due process review, is at an end if I find that the legislature rationally could have concluded that their goal was in the best interest of the people of Honolulu, and that the legislature could have determined that the regulations were a reasonable means to promote its objective. *Rogin v. Bensalem Township*, 616 F.2d at 688-89; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (analyzing the "public use" requirement of the Fifth Amendment under a "rational basis" analysis); *United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 1800 (1985).

Given my limited role in reviewing the legislation at issue, I have no problem finding that all of the zoning and land use regulations at issue are rationally related to legitimate planning goals. The DLUMs, General Plans, East Honolulu Development Plan and its amendments were concerned with such legitimate planning concerns as housing, transportation, commercial and economic growth, preservation of open space, and preservation of environmental and historical areas. For example, the stated legislative intent of the P-1 Preservation District is to

> establish areas to protect and preserve park lands, wilderness areas, open spaces, beach reserves, scenic areas and historic sites, open ranges, watersheds and water supplies; to conserve fish and wildlife; and to promote forestry and grazing.

Comprehensive Zoning Code of 1978, as amended, art. 3, sec. 21-3.1.

The plans and zoning scheme that were eventually enacted may not in fact have been the best means of achieving the legislative aims, but the legislature certainly could have concluded that they were a reasonable means to their ends.

This determination of course only addresses Bishop's claim that the regulations themselves deny them substantive due process. This does not dispose of the allegation that they were denied due process because the city misused its zoning

power by employing inequitable precondemnation procedures.[25]

VI

PROCEDURAL DUE PROCESS

In their complaints, plaintiffs assert that they have been denied procedural due process because the City has *de facto* taken their property interests without affording them procedural due process.[26] The City argues that plaintiffs are not entitled to procedural due process protection because in passing zoning regulations the City was acting in a legislative, as opposed to an administrative, capacity.

The Supreme Court and lower courts have long distinguished between administrative and legislative action, because our theory of government assumes that people are assured

---

25 Although neither plaintiff states an equal protection claim in their complaints, Kaiser argued in their briefs and at the hearing that the City violated their rights to equal protection. They claim that the City's rules were "applied differently" to Queen's Beach in the designation and zoning of the parcel, in the denial of their zoning application, and by the imposition of unreasonable exactions. They argue that this treatment was "discriminatory" and compensable under both due process and equal protection principles. I assume that Bishop is also making this assertion, although the record is unclear.

Bishop undeniably has the "right to be free of arbitrary or irrational zoning actions." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977). Absent allegations that the regulations involve a suspect classification, a court applies the traditional rational basis standard in reviewing legislation for equal protection violations. To prevail on this claim, Bishop must prove that the zoning regulations and their application "so lack rationality that they constitute a constitutionally impermissible denial of equal protection." *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976). As I have already found, however, the zoning regulations bear a rational relationship to legitimate planning objectives. The City's motion on this part of the equal protection issue must therefore be granted.

26 Plaintiffs also allege that they have been denied procedural due process in that the City has deprived them of their "vested property rights to develop Queen's Beach pursuant to the 1966 DLUM agreement and the City land use regulations pursuant to 1982." This claim is addressed *infra* section VIII under the discussion of plaintiffs' Conrract Clause claims.

input into the legislative process which seeks to balance the varied interests of society at large. Administrative actions, on the other hand, are those that affect only one or a few people and are case-by-case, so they do not involve a relatively large number of affected people to guard against unreasonable government action. As Justice Holmes observed in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915):

> Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.

Many courts, including the Ninth Circuit and the Supreme Court, have held that the enactment of a general zoning ordinance is a legislative act. *Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976); *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Rogin v. Bensalem Township*, 616 F.2d 680, 693 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981).[27] Simi-

---

27 Bishop has cited one case from an Illinois federal district court that, noting that it was very difficult to distinguish between legislative and administrative process in zoning actions, held that intervenors in a zoning action were entitled to some due process. Ultimately, the court held that they were not deprived of due process because they had a full hearing in court on the merits of their objections to the rezoning at issue. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 858-862 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

This case is clearly distinguishable from ours. In *Arlington Heights*, the board did not follow its normal zoning and annexation procedures and instead entered into negotiations for a consent decree. Additionally, the zone

larly, the Hawaii Supreme Court held that the enactment of and amendments to the General Plan or DLUMs constitute legislative process. *Kailua Community Council v. City and County of Honolulu*, 60 Hawaii 428, 591 P.2d 602 (1979) (holding the Hawaii Administrative Procedures Act inapplicable to actions by the city council and chief planning officer).

The general plans, DLUMs, and zoning codes at issue here were all enacted by ordinances. They "constitute general statements of [City] policy rather than specific applications of policy to a particular landowner, and therefore can be characterized only as legislative acts" to which Bishop may not claim any procedural rights. *Rogin v. Bensalem Township*, 616 F.2d at 693.[28]

Bishop argues that the regulations more severely burden them than other landowners. This claim is irrelevant. The mere fact that general zoning regulations may have a differential impact on Bishop does not entitle them to procedural safeguards where none are due. Our democratic system is founded on compromise and decisionmaking that is intended to produce the most equitable results overall. Our system would simply fall apart if every person disgruntled by a general law or regulation could claim rights to procedural due process.

In contrast to the legislative enactment of zoning ordinances or general plans, city activity involving specific building permits or variances is administrative in nature since it involves the application of zoning regulations to a specific parcel of property. However, Bishop has not alleged any procedural due process violations with respect to the denial of building permits or specific variance requests.

---

change involved only one specific piece of property; it was not part of widely applicable zoning ordinances or plans, as are the regulations at issue here.

28 Bishop argues that the decision to downzone Queen's Beach involved a specific parcel of land, and so the safeguard of legislative action was not present. However, this downzoning came as part of a development plan for all of east Honolulu and a comprehensive zoning code, and thus did affect the general populace.

Bishop also asserts that it is entitled to procedural safeguards, not just with respect to the actual zoning regulations, but with respect to all of the City's activities at Queen's Beach. These claims are appropriately considered under Bishop's cause of action for inequitable precondemnation activity.

VII

BISHOP HAS ALREADY RECEIVED SIGNIFICANT MONETARY GAINS.

The City argues that even if Bishop's claims were ripe it still would not be entitled to any compensation for its losses at Queen's Beach. The City argues that the taking inquiry asks whether "justice and fairness" require that the public at large, rather than the individual property owner, bear the burden of government regulation. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25; *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). The City argues that, in determining whether there has been a taking, a court should measure a landowner's interest in the whole parcel, not in an isolated tract that he may not be able to develop as he would wish. Under this view, Kaiser asserts, Bishop has already received enough money from the development at Hawaii Kai generally that the City's actions at Queen's Beach do not deny it the economically viable use of its land or "interfere with reasonable investment-backed expectations." *Williamson County*, 105 S. Ct. at 3119.

The City draws from a number of cases to support its contentions. In the *Penn Central* case, the Supreme Court held:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature

> and extent of the interference with rights in the parcel as a whole.

Penn Central Transportation Co., 438 U.S. at 130.

The Ninth Circuit has also recognized that a court must focus on the property as a whole. In *MacLeod v. Santa Clara County*, 749 F.2d 541, 547 (1984), *cert. denied*, 105 S. Ct. 2705 (1985), the court noted that the Supreme Court has

> long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the investment-backed expectations of a claimant that government deprivation of the rights to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole.

This recitation of the doctrine only takes the City so far, however. The takings question is an inherently fact-based inquiry. The determination whether to treat land as a single parcel for determining its value depends on numerous factors, such as unity of use, contiguity, physical characteristics, historical considerations, and how the land has been treated both by the landowner and by the government.

The cases cited by the City are distinguishable from Bishop's situation.[29] Here, the primary factor supporting the

---

29 In *Penn Central Transportation Co.*, 438 U.S. at 104, the Supreme Court held that "air rights" above a piece of property do not constitute a separate property interest.

In *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2705 (1985), the plaintiff bought a single parcel of land, consisting of two ranches. He continued the historic use of the property by leasing it out in its entirety for cattle grazing. Subsequently he entered into an agreement with a lumber company to harvest timber on the property, but the county denied his application for a use permit. The Ninth Circuit recited the *Penn Central* rule, but did not seem to apply it. Instead it found that the denial of a permit to harvest timber did not interfere with the two present and primary uses of the property—grazing and investment—and thus that it did not interfere with his primary investment-backed expectations concerning the use of the property. 749 F.2d at 547.

(*Footnote continued on next page*)

single parcel theory is that Bishop owns the property as a whole. However, Queen's Beach is non-contiguous since it is separated from the rest of Hawaii Kai by a road; Queen's Beach has not been developed by Bishop as part of the residential community of Hawaii Kai; Bishop and Kaiser have always considered Queen's Beach a separate area on which they seek to build a resort. Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes.[30] The City has zoned Queen's Beach for preservation uses, while most of the rest of Hawaii Kai is zoned residential, and Queen's Beach has consistently had a different land use designation from the rest of Hawaii Kai. Under the General Plans of 1960 and 1964, under the DLUMs of 1964 and 1966, under the 1973 revised City Charter, and under the

---

In *Deltona Corp v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982), the court held that the plaintiff had not been deprived of the economically viable use of his land because he had been able to develop over 80% of it and had doubled the market value of the property. In this case, however, plaintiff bought a 10,000 acre parcel in the Florida Gulf for development into a water-oriented residential community. The master plan called for a wholly-integrated community of homes, shops, schools and parks, but for development purposes, the plaintiff had divided his land into five construction areas which were to be built consecutively. Plaintiff was granted permits for three of the development areas, but was subsequently denied permits for the remaining two because of stricter federal environmental laws.

30 In this regard, Bishop is in a similar situation to the plaintiff in *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). In this case, which was decided before *MacLeod*, the plaintiff owned the "Point" and the "Spit," two contiguous parcels of property. The city council determined that the county should keep the Spit permanently as open space, and the county general plan incorporated this concept. Further, the county zoned the Spit separately for very low density housing, while the Point was zoned for higher density housing. The Ninth Circuit never actually determined whether the Point and the Spit should be considered one parcel, but it noted that the differential zoning tended to require their separate evaluation for takings purposes. The court also noted that a key consideration would be whether the parcels would be treated separately at the development stage by the plaintiff and the county, but that it could not determine this yet because the plaintiff had not submitted a development plan. 653 F.2d at 371.

1983 Development Plan, for example, Queen's Beach has been designated either commercial/resort or park/preservation, while the rest of Hawaii Kai has been designated primarily for residential use. In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking.

VIII

CONTRACT CLAUSE

Plaintiffs allege that the 1982 amendments to the General Plan, the enactment of the East Honolulu Development Plan, the withdrawal of the right to build a resort at Queen's Beach, and other acts of the City have violated their constitutional rights under the Contract Clause.[31] They argue first that the City has acted to impair the obligation of Bishop's contract with Kaiser for the development of Queen's Beach, and second, that the City has acted to impair its own contractual obligations to Kaiser and Bishop pursuant to the DLUM agreement. Neither of these claims has merit.

The Contract Clause provides that: "No State shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. Const. art. 1, § 10. The Supreme Court has set out a three-part test for determining whether a State's (of subdivision's) regulations work such an impairment. The threshold inquiry is whether the law has operated as a substantial impairment of a contractual relationship. If so, then a court determines whether there is a significant and legitimate public purpose behind the regulation and whether the adjustment of the rights and responsibilities of the contract is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the regulation. Where the contract involves the state, the court must scrutinize the purpose more carefully. Where, as here, the contract only involves private

---

31 The fact that Kaiser does not have a property interest at Queen's Beach does not preclude it from asserting its contract clause claims, which are based on its Development Agreement with Bishop.

parties and the legislation involves social or economic welfare, the court defers to the legislative judgment as to the necessity and reasonableness of the measure. *See, e.g., Energy Reserves Group Inc. v. Kansas Power and Light*, 459 U.S. 400, 410-13 (1983); *Allied Structural Steel Co. v. Spannous*, 438 U.S. 234 (1978); *Troy Ltd. v. Renna*, 727 F.2d 287, 296-98 (3d Cir. 1984).

The Ciry argues that plaintiffs cannot get past the first step because the regulations have not acted on the contract to adjust the rights and responsibilities of Kaiser and Bishop. In order to have a constitutionally protected impairment, the law has to act on the contract itself, as distinguished from the subject matter of the contract. An otherwise valid law is not unconstitutional merely because an object of regulation is also the subject of a contract. *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 680 (1st Cir. 1974).

It appears that plaintiffs have confused impairment of the performance of their development agreement with impairment of the obligation of the contract. As one court has explained,

> The contract clause of the federal Constitution does not bar all governmental action affecting profitability of private contracts, even where the effect of such action is to diminish the likelihood that one or more of the parties will keep their bargain. Rather, the clause forbids an alteration in the relative position of two parties to an existing contract.

Metropolitan St. Louis Sewer District v. Ruckelshaus, 590 F. Supp. 385, 389 (E.D. Mo. 1984). *See also South Terminal Corp.*, 504 F.2d at 679-80; *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 311-12 (8th Cir. 1978).

As the City points out, the zoning regulations did not alter the terms of the contract between Bishop and Kaiser, but simply affected the uses which could be made of Queen's Beach. Thus the regulations only affect the property which is the subject matter of the contract. Kaiser still has the contractual rights to develop at Hawaii Kai, if it can get the nec-

essary approvals; Bishop still has the obligation to allow the development; the financial arrangements between the parties remain unchanged. Indeed, the City's actions may have made performance of the contract less profitable and less likely, but this gives rise only to an action between the parties for breach of contract—not a constitutional claim.

Plaintiffs' second claim is that the City has acted to impair its own contractual obligations to Bishop and Kaiser pursuant to the DLUM to allow them to develop a resort at Queen's Beach. As has been discussed, however, the DLUM was not the equivalent of a zoning ordinance, and moreover, zoning ordinances are not contracts with developers. It is simply not within the City's power to contract away essential police powers, such as the ability to make future zoning decisions. The City had no contractual obligations with Kaiser or Bishop in this regard.

CONCLUSION

In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning inequitable precondemnation activities.

Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County*; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

An appropriate order shall be submitted to the court by defendant through plaintiffs and plaintiffs/intervenors. In the event that the parties are not able to agree upon the form of

the order, a conference to settle the order will be held upon request.

DATED: Honolulu, Hawaii, September 25, 1986

[ILLEGIBLE]
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-2689, 87-2690

Argued and Submitted Nov. 16, 1988

Decided March 21, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.,

Plaintiffs/Intervenors-Appellants,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs-Appellants,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.,

Plaintiffs/Intervenors,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

Before

CHAMBERS, O'SCANNLAIN and TROTT,

Circuit Judges.

Appeal from the United States District Court for the District of Hawaii; Samuel P. King, District Judge, Presiding.

Barbara R. Banke and Jess S. Jackson, San Francisco, Cal., *for plaintiffs-appellants.*

Gideon Kanner, Burbank, Cal., *for plaintiffs-intervenors.*

H. Bissell Carey, III and Steven L. Richards, Robinson & Cole, Hartford, Conn., *for defendant-appellee.*

Mary Gray Holt, Gail Ruderman Feuer, Deputy Attys. Gen., Los Angeles, Cal., for amici curiae; John K. Van de Kamp, Atty. Gen. for the State of Cal.

The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F.Supp. 926 (D.Haw.1986). We conclude that no other cases decided since the date of that decision change the validity of Judge King's reasoning or the result in this appeal. Among the cases we have considered are *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,

882 F.2d 1398 (9th Cir.1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990); *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir.1989); *Lai v. City and County of Honolulu*, 841 F.2d 301 (9th Cir.1989), *cert. denied*, ____ U.S. ____, 109 S.Ct. 560, 102 L.Ed.2d 586 (1989); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir.1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 134, 102 L.Ed.2d 106 (1989); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir.1987), *modified*, 857 F.2d 567, *cert. denied*, ____ U.S. ____, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Lake Nacimiento Ranch v. San Luis Obispo County*, 830 F.2d 977 (9th Cir.1987), *cert. denied*, ____ U.S. ____, 109 S.Ct. 79, 102 L.Ed.2d 55 (1989); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.1987), *modified*, 830 F.2d 968, *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988); *Uffman v. Housing Finance and Development Corp.*, 760 P.2d 1115 (Hawaii 1988).

Our decision in the appeal from the directed verdict will be filed separately in an unpublished memorandum.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-0389

Filed August 10, 1987

Walter A.Y.N. Chinn, Clerk

KAISER DEVELOPMENT COMPANY, also known as KACOR DEVELOPMENT COMPANY, a California corporation, KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

—vs.—

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMPSON, WILLIAM S. RICHARDSON, and HENRY H. PETERS, JR., Trustees of the Kamehameha Schools/ Bishop Estate,

Plaintiffs/Intervenors,

—vs.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendants.

DECISION AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

The Plaintiffs/Intervenors Trustees of the Estate of Bernice Pauahi Bishop, having rested at the close of the evidence offered by them, the Defendant City and County of Honolulu moves for a directed verdict. The test for the court to apply to this motion is whether the evidence is such that, without considering the credibility of the witnesses or the

weight of the evidence and viewing the evidence including all reasonable inferences therefrom most favorably to the Plaintiffs/Intervenors, there can be but one conclusion as to the verdict that reasonable jurors could reach. *California Computer Products, Inc. v. International Business Corp.*, 613 F.2d 727, 734 (9th Cir. 1979) ("[I]f there is no substantial evidence to support the claim, the court must direct a verdict."); *See also Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 853 n.2 ("evidence as a reasonable mind might accept as adequate to support a conclusion").

At times as the case proceeded, it has not been entirely clear whose complaint was being tried. The original complaint was filed by Kaiser Development Company (also Kacor Development Company) and Kaiser Hawaii Kai Development Co., on April 24, 1984. Plaintiffs/Intervenors filed a Complaint in Intervention on July 19, 1985. Their complaint tracked the original Kaiser complaint and a separate complaint which they had filed on May 9, 1984. *Lyman v. City and County of Honolulu*, Civ. No. 0449 (magistrate denied consolidation but granted intervention).

Defendant City and County of Honolulu brought motions for summary judgment on all claims by the original Plaintiffs and the Plaintiffs/Intervenors which motions this court decided in 1986. *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986). The court granted the Defendant's motions for summary judgment "on all causes of action except for Bishop's claims concerning inequitable precondemnation activities." 649 F. Supp. at 949.

The decision was quite specific. The Conclusion reads as follows:

> Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County*; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due

> process; and that the City has not violated the guaranties of the Contract Clause.

Id.

Notwithstanding this decision, the Plaintiffs/Intervenors offered evidence which this court allowed to be introduced before the jury but which had more relevance to the causes of action on which summary judgment in favor of the Defendant had been granted than to the remaining claims.

Inequitable precondemnation activities imply a related "taking" either by formal condemnation proceedings or by inverse condemnation. During the course of the trial, the court ruled on one aspect of this claim in connection with damages. That ruling was, in part, that:

> The due process claim, as I understand it is based upon a "taking." Absent a "taking, any due process claim as I see it would be based upon the zoning regulation itself. The claims based upon over-regulation are no longer part of this case. Therefore, the Plaintiffs/Intervenors will have a § 1983 claim only if they prove their "taking" claim.

Order Regarding Expert Testimony on Damages at 3 (July 24, 1987).

As there has not been a formal condemnation proceeding, Plaintiffs/Intervenors' remaining claims depend upon a finding of a "taking" by inverse condemnation. Much evidence was introduced regarding actions and statements by individuals in the City administration and on the City Council. These actions and statements were relevant to the interpretation of City policy but are not a substitute for official City policy. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986). In fact, the evidence has been clear that the executive branch and the legislative branch of the City were often taking opposing positions in regard to the development of Queen's Beach.

Official City action impacting on Queen's Beach was not taken until the new General Plan and the revised zoning were

adopted by the joint action of the several departments and branches of the City. That action deleted the resort designation previously noted on portions of Queen's Beach, redesignated the area for preservation and park uses, and changed the zoning of Queen's Beach from R-6 to P-1 (later to P-2 but without significantly different allowable uses). More specifically, and for the purposes of this motion, we may assume that the City officially targeted some 80 acres at Queen's Beach for condemnation as a park within two to six years, of which three years have already passed.

Stated another way, the question is whether action by a municipality targeting an area for acquisition for public purposes with accompanying restrictive land use designations and zoning results immediately in an inverse condemnation prohibited by the federal Constitution as made applicable to the States through the fourteenth amendment and actionable under the Civil Rights Act, 42 U.S.C. § 1983, *et seq.*, and if not immediately then when if ever.

To prove a "taking," Plaintiffs/Intervenors must establish that pursuant to an intent to acquire Queen's Beach, the City engaged in unreasonable conduct which substantially interfered with the right to use the property. *Martino v. Santa Clara Valley Water District*, 705 F.2d 1141, 1147 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1983).

Plaintiffs/Intervenors have argued that the standard of "substantial interference" as set forth in *Martino* is something less than the standard of "no economically viable use" which is applicable in inverse condemnation cases based upon zoning regulations. *See, e.g., Nollan v. California Coastal Commission*, 55 U.S.L.W. 5145, 5147 (June 26, 1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 255, 260 (1980).

I reject this argument. While the legal theories differ as to what type of governmental activity may constitute a "taking," that does not change the *degree* of interference which constitutes a "taking" under the federal constitution. Reading *Martino* in the context of the United States Supreme Court cases on "taking," I read "substantial interference" as another term for "no viable economic use."

Plaintiffs/Intervenors have presented two expert witnesses who testified as to value under existing zoning. Mr. William Dornbush who gave extensive testimony regarding the permitted uses of golf course (private and public), testified that a private golf course would be economically viable although clearly not as profitable as resort development. (Testimony of July 28, 1987). Mr. Albert Schlarmann testified that it would not be "economic" to purchase the property under the current zoning, except "perhaps" for speculation. (Testimony of August 6, 1987).

Based upon the evidence presented, I find there has not been "substantial evidence presented that could support a finding for . . . the nonmoving party." *California Computer Products*, 613 F.2d at 734, *quoting Chisholm Brothers Farm Equipment Co.*, 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). This does not mean that a municipality can designate an area for park indefinitely without instituting condemnation proceedings. While there must be some degree of freedom in the land use planning function, it is clearly established that the government can "go too far."

The land owner can force the issue by applying for permitted uses. If he is refused, he may then be able to show that he has been deprived of all use of his property. Absent such a refusal, the landowner must be able to establish that the permitted uses under existing zoning would not be economically viable. If the landowner determines that the zoning itself deprives him of all economically viable use, he can pursue a remedy for inverse condemnation based upon the regulation itself. This is the cause of action which in this case was earlier found to be not ripe under *Williamson County*. *See* 646 F. Supp. 926.

For the reasons and upon the grounds set forth above, the Defendant's Motion for Directed Verdict is HEREBY GRANTED. The Clerk is ordered to enter judgment dismissing the complaint

SO ORDERED.

DATED: Honolulu, Hawaii, August 10, 1987.

/s/ SAMUEL P. KING
United States District Judge

KAISER DEVELOPMENT COMPANY, KAISER HAWAII KAI DEVELOPMENT CO., vs. LYMAN, *et al.*, vs. CITY AND COUNTY OF HONOLULU, a municipal corporation, CIVIL NO. 84-0389, DECISION AND ORDER GRANTING MOTION FOR DIRECTED VERDICT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-2689

DC No. CV-84-0389-SPK

Filed March 21, 1990

Cathy A. Catterson, Clerk

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; and HENRY H. PETERS, JR.,

Plaintiffs/Intervenors-Appellants,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

No. 87-2690

DC No. CV-84-0389-SPK

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs-Appellants,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; and HENRY H. PETERS, JR.,

Plaintiffs/Intervenors,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted November 16, 1988
Honolulu, Hawaii

Before:
CHAMBERS, O'SCANNLAIN, and TROTT,
Circuit Judges.

MEMORANDUM*

We are asked to decide whether the district court erred in granting the City and County of Honolulu's ("Honolulu") motion for a directed verdict against the Trustees of the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Estate of Bernice P. Bishop ("Bishop") and Kaiser Development Company ("Kaiser"). The district court ordered a directed verdict after determining that Kaiser and Bishop had failed to produce sufficient evidence to support their inequitable precondemnation activities claim against Honolulu. We affirm.

I

In 1961, Bishop entered into an agreement (the "development agreement") with Kaiser to develop 6,000 acres of land in Honolulu, a portion of which includes a parcel known as Queen's Beach. Kaiser developed most of the property into a new urban community known as Hawaii Kai. Kaiser expected to build a large resort/hotel complex at Queen's Beach, asserting that it considered this project its "crown jewel" and economic reward for having developed the vast Hawaii Kai community. Kaiser spent over $8 million in building the Hawaii Kai infrastructure to accommodate the anticipated resort/hotel development, but made no attempt to develop Queen's Beach until 1971.

The 1960 and 1964 General Plans for the long range development of Honolulu, adopted pursuant to the Honolulu City Charter, designated Queen's Beach as a resort and commercial area. Queen's Beach also was designated as a resort and commercial area in both the 1964 and 1966 Detailed Land Use Maps ("DLUM"), which were adopted for numerous areas of Honolulu to accompany the General Plan.

In 1977, a new General Plan became effective which also listed Queen's Beach as a potential resort site. In 1982, however, a revised General Plan modified the population densities and removed the designation of the area as a future resort site. In 1983, the City enacted the East Honolulu Development Plan (the "Development Plan") which changed the previous DLUM resort designation of Queen's Beach to one of preservation and park uses.

The history of these plans is somewhat confused because the zoning codes were not updated when each new General

Plan was adopted. From 1960 to 1969, Queen's Beach was zoned residential. This zoning remained in effect until 1984, when Queen's Beach was zoned for preservation and park use.

In 1971, Kaiser applied to have its Queen's Beach property rezoned from residential to resort in accordance with the 1964 and 1966 DLUMs, but Kaiser later withdrew the request. In February 1983, Kaiser applied for approval of a residential subdivision at Queen's Beach in conformity with the existing residential zoning. The city denied the application after the passage of the Development Plan later that year. The denial was upheld by the zoning board of appeals. Kaiser made no subsequent attempt to apply for development permits, zoning changes, or variances at Queen's Beach under the new preservation and park zoning.[1]

Kaiser and Bishop brought this suit against Honolulu under 42 U.S.C. § 1983. Honolulu moved for summary judgment. The district court granted summary judgment in favor of Honolulu on all but one of the claims before the court;[2] Bishop and Kaiser's claim of inequitable precondemnation activites proceeded to trial. At the close of Kaiser and Bishop's evidence in support of its claim, the district court granted a directed verdict in favor of Honolulu.

We here consider Kaiser's and Bishop's joint appeal from the directed verdict. A directed verdict is proper where the evidence permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1126 (1986).

II

This court recognizes that, in some limited circumstances, a city's precondemnation activities can give rise to a takings

---

1 This zoning allows for a variety of uses. For instance, the zoning permits the land to be used for fish hatcheries and ponds, forests, game preserves, private golf courses, botanical gardens, cemeteries, and camps.

2 This decision has been affirmed in *Kaiser Development Co. v. Honolulu*, No. _____, slip op. _____ (9th Cir. _____ __, 1990).

claim in favor of a property owner. In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), for instance, we found that a municipal redevelopment agency's activities effected a compensable taking under the fifth and fourteenth amendments to the United States Constitution. The property had been "rendered unsaleable in the open market; its uses were severely limited by [the] Agency; commercial lenders refused to make loans on the subject property; and [the property owner's] peaceful enjoyment and its right to all rents and profits from the property were substantially impaired." *Id.* at 1331.

Kaiser and Bishop allege that the district court applied the wrong legal standard in determining whether they had presented sufficient evidence to support their inequitable precondemnation activities claim. The district court found that such a claim requires proof that there is "no economically viable use" for the land. Appellants contend that they need show only that "a public entity acting in furtherance of a public project directly and substantially interfere[d] with property rights and thereby significantly impair[ed] the value of property." *Richmond Elks*, 561 F.2d at 1330; *see also Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983).

We disagree. A cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has " 'denie[d] [him] economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). "[I]n the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984).

Under this standard, it is clear to us that the directed verdict was proper. At trial, Bishop presented two expert witnesses who testified to the value of Queen's Beach under

existing zoning. One witness gave extensive testimony regarding the permitted use of a golf course. He stated that a private golf course would be economically viable, albeit not as profitable as a resort development. Another witness testified that it would not be "economic" to purchase the property under the current zoning except "perhaps" for speculation. We agree with the district court that the evidence permitted only one reasonable conclusion as to the verdict.[3] *See Patterson*, 771 F.2d at 1256.

Kaiser and Bishop also argue that the district court abused its discretion in excluding certain evidence at trial. *See Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988)) (court of appeals reviews district court's ruling on evidentiary questions for abuse of discretion only). They charge that the district court erred by excluding certain testimony of Deputy Parks Director Ramon Duran and City planner Verne Winquist as well as other evidence, including a chart and exhibits.

We disagree. The district court properly excluded this evidence as not relevant to the inequitable precondemnation activities claim. The court properly focused on "what was done with this particular property in connection with the applications . . . and not what they [*i.e.*, the city officials] discussed in the back room on a lower level." *See* Reporter's Transcript at 151 (July 7, 1987).

Finally, appellants question whether the City's alleged attempt to exact a 37-acre park in 1973-75, its alleged exaction of an 80-acre parcel of land in 1983-84, and its redesignation of Queen's Beach from "resort" to "park and preservation" use constituted "unconstitutional exactions." *See Nollan*, 483 U.S. at 838-42. Appellants failed, however, to specify at trial that they were pursuing a separate claim based on unconstitutional exaction. We therefore have no factual record to assist us in ruling on this claim and hence

---

3 Because we find that Bishop did not offer any substantial evidence that it had no economically viable use for its property, we need not decide if the City took "official action" here. *See Richmond Elks*, 561 F.2d at 1331 (acknowledging "official action" requirement for inequitable precondemnation claim and finding such action in that case).

do not reach this question. *See Commissioner v. McCoy*, 108 S. Ct. 217, 218-19 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2689

D.C. No. CV-84-0389-SPK

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.,

Plaintiffs/Intervenors-Appellants,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

No. 87-2690

D.C. No. CV-84-0389-SPK

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, a California corporation; KAISER HAWAII KAI DEVELOPMENT CO., a Nevada corporation,

Plaintiffs-Appellants,

—and—

RICHARD LYMAN, JR.; MATSUO TAKABUKI; MYRON B. THOMPSON; WILLIAM S. RICHARDSON; and HENRY H. PETERS, JR.,

Plaintiffs/Intervenors,

—v.—

CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
November 16, 1988—Honolulu, Hawaii

Memorandum Filed March 21, 1990
Order and Opinion Filed September 4, 1990

Before:

RICHARD H. CHAMBERS, DIARMUID F. O'SCANNLAIN, and STEPHEN S. TROTT, *Circuit Judges.*

ORDER AND OPINION

SUMMARY

Constitutional Law/Land Use and Zoning

Per Curiam:

Affirming a judgment on a directed verdict, the court of appeals held that a city's precondemnation zoning activities was not a "taking" of property in violation of the fifth amendment.

The court denied the petitions for rehearing and rejected the suggestions for rehearing en banc. The court made

numerous changes to its previous memorandum filed March 21, 1990 and and redesignated its previous memorandum as a per curiam opinion for publication.

Appellants, the Trustees of the Estate of Bernice P. Bishop (Bishop), entered into an oral agreement with Kaiser Development Company to develop land in Honolulu, a portion of which included land known as Queen's Beach. Kaiser developed most of the property into an urban community, and expected to build a resort/hotel complex at Queen's Beach. Although in 1960, the General Plans of the City of Honolulu designated Queen's Beach as a resort and commercial area, in 1984 Queen's Beach was zoned for preservation and park use. In 1983, Kaiser applied for approval of a residential subdivision at Queen's Beach to conform with the existing residential zoning. The City of Honolulu denied the application after passage of its Development Plan later that year. The denial was upheld by the zoning board of appeals. Kaiser made no subsequent attempt to apply for development permits, zoning changes, or variances at Queen's Beach under the new preservation and park zoning. The district court granted summary judgment for Honolulu on all but one of the claims brought by Kaiser and Bishop. Bishop's claim of inequitable precondemnation activities proceeded to trial. At the close of Bishop's evidence, the district court granted a directed verdict in favor of Honolulu.

[1] The court recognized that in some limited circumstances, a city's precondemnation activities can give rise to a takings claim in favor of a property owner. [2] Although Bishop alleged that the district court applied the wrong legal standard in determining whether it had presented sufficient evidence to support its inequitable condemnation activities claim, the district court determined that such a claim required proof that there was "no economically viable use" for the property. [3] The court noted that Supreme Court precedent unequivocally indicates that the government does not take an individual's property unless it has denied him an economically viable use of his land. In the absence of an interference with the owner's right to dispose of his land, even a substantial reduction of the attractiveness of the property to poten-

tial purchasers does not entitle the owner to compensation under the fifth amendment. [4] The district court did not abuse its discretion in properly excluding evidence as not relevant to the inequitable precondemnation activities claim. The court properly focused on what was done to the particular property in connection with the application, and not what lower city officials discussed in private. [5] The court did not rule on Bishop's claim of unconstitutional exaction. Bishop failed to specify at trial that it was pursuing a separate claim on this basis. The court had no factual record to assist it in ruling on this claim.

COUNSEL

Barbara R. Banke, San Francisco, California, *for the plaintiffs-appellants.*

Gideon Kanner, Burbank, California, *for the plaintiffs/intervenors-appellants.*

H. Bissell Carey, III, Robinson & Cole, Hartford, Connecticut, *for the defendant-appellee.*

ORDER

The memorandum filed on March 21, 1990 is amended as follows:

page 2, line 14, delete "and Kaiser Development Company ("Kaiser")"

page 2, line 16, delete "Kaiser and"

page 2, line 17, delete "their" and insert "its"

page 2, line 20, insert "Development Company ("Kaiser")" after "Kaiser"

page 4, line 8, insert " 's" after "Bishop" and delete "and Kaiser's"

page 4, line 10, delete "Kaiser and"

page 4, line 12, delete "Kaiser and" and "joint"

page 5, line 7, delete "Kaiser and" and add an "s" to the end of "allege"

page 5, line 12, delete "Appellants" and insert "Bishop", add an "s" to the end of "contend," and delete "they" and insert "it"

page 6, line 15, delete "Kaiser and" and insert "s" after "argue"

page 7, line 8, delete "appellants" and insert "Bishop" and insert "s" after "question"

page 7, line 13, delete "Appellants" and insert "Bishop" and delete "they" and insert "it"

page 7, line 14, delete "were" and insert "was".

As amended, the memorandum is redesignated as a per curiam opinion for publication.

The panel has voted to deny the petitions for rehearing. Judges O'Scannlain and Trott have voted to reject the suggestions for rehearing en banc, and Judge Chambers so recommends. The full court has been advised of the en banc

suggestions, and no judge of the court has requested a vote on them.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

OPINION

PER CURIAM:

We are asked to decide whether the district court erred in granting the City and County of Honolulu's ("Honolulu") motion for a directed verdict against the Trustees of the Estate of Bernice P. Bishop ("Bishop"). The district court ordered a directed verdict after determining that Bishop had failed to produce sufficient evidence to support its inequitable precondemnation activities claim against Honolulu. We affirm.

I

In 1961, Bishop entered into an agreement (the "development agreement") with Kaiser Development Company ("Kaiser") to develop 6,000 acres of land in Honolulu, a portion of which includes a parcel known as Queen's Beach. Kaiser developed most of the property into a new urban community known as Hawaii Kai. Kaiser expected to build a large resort/hotel complex at Queen's Beach, asserting that it considered this project its "crown jewel" and economic reward for having developed the vast Hawaii Kai community. Kaiser spent over $8 million in building the Hawaii Kai infrastructure to accommodate the anticipated resort/hotel development, but made no attempt to develop Queen's Beach until 1971.

The 1960 and 1964 General Plans for the long range development of Honolulu, adopted pursuant to the Honolulu City Charter, designated Queen's Beach as a resort and commercial area. Queen's Beach also was designated as a resort and commercial area in both the 1964 and 1966 Detailed Land

Use Maps ("DLUM"), which were adopted for numerous areas of Honolulu to accompany the General Plan.

In 1977, a new General Plan became effective which also listed Queen's Beach as a potential resort site. In 1982, however, a revised General Plan modified the population densities and removed the designation of the area as a future resort site. In 1983, the City enacted the East Honolulu Development Plan (the "Development Plan") which changed the previous DLUM resort designation of Queen's Beach to one of preservation and park uses.

The history of these plans is somewhat confused because the zoning codes were not updated when each new General Plan was adopted. From 1960 to 1969, Queen's Beach was zoned residential. This zoning remained in effect until 1984, when Queen's Beach was zoned for preservation and park use.

In 1971, Kaiser applied to have its Queen's Beach property rezoned from residential to resort in accordance with the 1964 and 1966 DLUMs, but Kaiser later withdrew the request. In February 1983, Kaiser applied for approval of a residential subdivision at Queen's Beach in conformity with the existing residential zoning. The city denied the application after the passage of the Development Plan later that year. The denial was upheld by the zoning board for appeals. Kaiser made no subsequent attempt to apply for development permits, zoning changes, or variances at Queen's Beach under the new preservation and park zoning.[1]

Kaiser and Bishop brought this suit against Honolulu under 42 U.S.C. § 1983. Honolulu moved for summary judgment. The district court granted summary judgment in favor of Honolulu on all but one of the claims before the court;[2] Bishop's claim of inequitable precondemnation activities proceeded to trial. At the close of Bishop's evidence in support

---

1 This zoning allows for a variety of uses. For instance, the zoning permits the land to be used for fish hatcheries and ponds, forests, game preserves, private golf courses, botanical gardens, cemeteries, and camps.

2 This decision has been affirmed in *Kaiser Development Co. v. Honolulu*, Nos. 87-2689, 87-2690, slip op. 2983 (9th Cir. March 21, 1990).

of its claim, the district court granted a directed verdict in favor of Honolulu.

We here consider Bishop's appeal from the directed verdict. A directed verdict is proper where the evidence permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1126 (1986).

II

[1] This court recognizes that, in some limited circumstances, a city's precondemnation activities can give rise to a takings claim in favor of a property owner. In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), for instance, we found that a municipal redevelopment agency's activities effected a compensable taking under the fifth and fourteenth amendments to the United States Constitution. The property had been "rendered unsaleable in the open market; its uses were severely limited by [the] Agency; commercial lenders refused to make loans on the subject property; and [the property owner's] peaceful enjoyment and its right to all rents and profits from the property were substantially impaired." *Id.* at 1331.

[2] Bishop alleges that the district court applied the wrong legal standard in determining whether they had presented sufficient evidence to support their inequitable precondemnation activities claim. The district court found that such a claim requires proof that there is "no economically viable use" for the land. Bishop contends that it need show only that "a public entity acting in furtherance of a public project directly and substantially interfere[d] with property rights and thereby significantly impair[ed] the value of property." *Richmond Elks*, 561 F.2d at 1330; *see also Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983).

[3] We disagree. A cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate

that the government does not take an individual's property unless it has " 'denie[d] [him] economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). "[I]n the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984).

Under this standard, it is clear to us that the directed verdict was proper. At trial, Bishop presented two expert witnesses who testified to the value of Queen's Beach under existing zoning. One witness gave extensive testimony regarding the permitted use of a golf course. He stated that a private golf course would be economically viable, albeit not as profitable as a resort development. Another witness testified that it would not be "economic" to purchase the property under the current zoning except "perhaps" for speculation. We agree with the district court that the evidence permitted only one reasonable conclusion as to the verdict.[3] *See Peterson*, 771 F.2d at 1256.

Bishop also argues that the district court abused its discretion in excluding certain evidence at trial. *See Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988) (court of appeals reviews district court's ruling on evidentiary questions for abuse of discretion only). They charge that the district court erred by excluding certain testimony of Deputy Parks Director Ramon Duran and City planner Verne Winquist as well as other evidence, including a chart and exhibits.

[4] We disagree. The district court properly excluded this evidence as not relevant to the inequitable precondemnation activities claim. The court properly focused on "what was done with this particular property in connection with the

---

3 Because we find that Bishop did not offer any substantial evidence that it had no economically viable use for its property, we need not decide if the City took "official action" here. *See Richmond Elks*, 561 F.2d at 1331 (acknowledging "official action" requirement for inequitable precondemnation claim and finding such action in that case).

applications . . . and not what they [*i.e.*, the city officials] discussed in the back room on a lower level." *See* Reporter's Transcript at 151 (July 7, 1987).

[5] Finally, Bishop questions whether the City's alleged attempt to exact a 37-acre park in 1973-75, its alleged exaction of an 80-acre parcel of land in 1983-84, and its redesignation of Queen's Beach from "resort" to "park and preservation" use, constituted "unconstitutional exactions." *See Nollan*, 483 U.S. at 838-42. Bishop failed, however, to specify at trial that it was pursuing a separate claim based on unconstitutional exaction. We therefore have no factual record to assist us in ruling on this claim and hence do not reach this question. *See Commissioner v. McCoy*, 108 S. Ct. 217, 218-19 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

AFFIRMED.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

* * *

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CHAPTER 516
RESIDENTIAL LEASEHOLDS

PART I. GENERAL PROVISIONS

§ 516-1 Definitions. Unless otherwise clear from the context, as used in this chapter:

"Corporation" means the housing finance and development corporation created by chapter 201E.

"Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots, including residential lots which may have been converted to fee simple and streets and roadways developed as an integral part of the development tract. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, fee lot, or other like interference.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the holder's heirs, successors, legal representatives, and assigns.

"Lease" means a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, twenty years or more (including any periods for which the lease may be extended or renewed at the option of the lessee).

"Leased fee" and "leased fee interest" means all of the interests of the fee owner, lessor, and all legal and equitable owners of the land which is leased, other than the lessee's interest as defined by this chapter.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in the fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee' means any person to whom land is leased or subleased, and the lessee's heirs, successors, legal representatives, and assigns.

"Lessor" means any person who leases or subleases land to another, and the lessor's heirs, successors, legal representatives, and assigns.

The terms "lessor", "lessee", "fee simple owner", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee", the terms also include corporations, firms, associations, trusts, estates, and the State or its political subdivisions. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

"Lot", "houselot", "residential lot", and "residential houselot" mean a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families.

"Offsite improvements" means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes and underground electric cables, constructed or placed in a subdivision off the lots included intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by the occupants of all lots for whose benefit the improvements have been constructed or placed.

"Onsite improvement" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefits of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

"Owner's basis" means the value of the lessor's leased fee interest in the lot that would apply if such interests were normally traded on an open market. The fair market value of the owner's basis shall be established to provide the lessor with just compensation for the lessor's interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value may be determined by either of the following methods, or any other method which is normally used by qualified appraisers in establishing the fair market value of a lessor's leased fee interest in land:

(1) The sum of: (i) the future rental income stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the corporation; or

(2) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite improvements, established by a market date approach utilizing comparable sales, less the following:

(A) The value of the lease, including any rights therein, if any, which accrues to the lessee;

(B) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(C) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for

or otherwise contributed, directly or indirectly, by the lessee;

(D) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(E) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(F) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sale, and similar fee;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions. [L 1967, c 307, § 2; HRS § 516-1; am L 1968, c 46, § 2a to d; am L 1975, c 184, § 2(1), am L 1976, c 242, § 1; am L 1978, c 140, § 1; am L 1979, c 227, § 1; am L 1980, c 39, § 2 and c 107, § 2; am imp L 1984, c 90, § 1; am L 1986, c 165, § 1; am L 1988, c 104, § 1]

§§ 516-6 to 9 AMENDED. "Hawaii housing authority" or "authority" changed to "housing finance and development corporation" or "corporation". L 1987, c 337, § 16 and L 1988, c 104, § 2.

CONDEMNATION OF DEVELOPMENT TRACT

§ 516-21 AMENDED. "Hawaii housing authority" or "authority" changed to "housing finance and development corporation" or "corporation". L 1987, c 337, § 16 and L 1988, c 104, § 2.

§§ 516-23 Exercise of power of eminent domain. Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101. If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation. [L 1967, c 307, § 12; HRS § 516-23; am L 1975, c 1984, § 2(7)]

§ 516-24 Compensation. The compensation to be paid for the leased fee interest in a residential houselot within a tract shall be the owner's basis as defined in section 516-1(14). The compensation shall be determined as of the date of the summons of the complaint in eminent domain. [L 1967, c 307, § 13; HRS § 516-24; am L 1968, c 46, § 2e; am L 1975, c 184, § 2(8); am L 1983, c 204, § 2]

[§ 516-24.5] Exchanges. (a) The authority may exchange public lands for private lands to be condemned or involuntarily sold pursuant to this chapter; provided that any such exchange shall be subject to legislative disapproval; provided further that lands exchanged need not be of like-kind or comparable use; and provided further that no lands classified as conservation shall be exchanged for private lands.

(b) The authority may acquire private lands by negotiated sale for purposes of exchanging such land with private lands pursuant to subsection (a). The legislature declares that such

acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible. [L 1975, c 184, § 2(21)]

§ 516-25 Interest acquired. (a) Upon acquisition of the leased fee interest in residential houselots within all or a portion of a development tract as provided in this part, the property interest acquired by the Hawaii housing authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the residential houselots acquired; subject to existing leases of residential houselots within the development tract, and to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether the interest be a remainder, vested or contigent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the leasehold is subject to any mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee shall in no manner affect or impair the mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to extent necessary to avoid any impairment of such leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance shall in writing consent to the transfer thereof to the fee as herein provided. Upon the written consent by the holder thereof, each such mortgage, lien, or encumbrance to which the leasehold is subject and to which such consent refers shall be transferred to and shall bind the fee acquired by the lessee, and shall thereafter continue in

full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest. [L 1967, c 307, § 14; HRS § 516-25; am L 1975, c 184, § 2(9)]

§ 516-26 Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable owners shall share in the compensation paid by the Hawaii housing authority as their respective interests appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in such compensation paid by the authority to the extent of the developer's or other person's interest as may be determined by agreement of those entitled to share in the compensation paid by the authority, or in the absence of such agreement, pursuant to chapter 658. [L 1967, c 307, § 15; HRS § 516-26; am L 1975, c 184, § 2(10); am imp L 1984, c 90, § 1]

1959 CHARTER OF THE CITY AND COUNTY OF HONOLULU

Section 5-503. Powers, duties and functions of the planning director. The planning director shall:

(a) Prepare a general plan and development plans for the improvement and development of the city.

(b) Prepare an ordinance governing the subdivision of lands within the city.

(c) Prepare zoning ordinances, zoning maps and regulations, and any amendments or modifications thereto.

(d) Consolidate the lists of proposed capital improvements contemplated by the several departments in the order of their priority.

(e) Be charged with the administration of the subdivision and zoning ordinances and regulations adopted thereunder.

(f) Advise the mayor and council on matters concerning the planning program.

* * *

Section 5-509. General plan. The general plan shall set forth the council's policy for the long range, comprehensive physical development of the city. The general plan shall include a map of the city and shall contain a statement of development objectives, standards and principles with respect to the most desirable use of land within the city for residential, recreational, agricultural, commercial, industrial and other purposes; the most desirable density of population in the several parts of the city; a system of principal thoroughfares, highways, streets and other public open spaces; the general location, relocation and improvement of public buildings; the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, sewers, light, power, transit and other purposes; the extent and location of public housing projects; adequate drainage facilities and control; and such other matters as may, in the council's judgment, be beneficial to the city. The plan shall be based upon studies of physical, social, economic and governmental conditions and trends and shall be designed to assure the coordinated development of the city and to promote the general welfare and prosperity of its people.

Section 5-512. Adoption of the general plan and development plans. 1. The council shall adopt the general plan or any development plan by ordinance.

Section 5-514. Zoning ordinances. The council shall enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan.

Supreme Court, U.S.
FILED
MAR 8 1991
OFFICE OF THE CLERK

(2)

No. 90-1108

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT CORPORATION, and KAISER HAWAII KAI DEVELOPMENT COMPANY,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. BISSELL CAREY, III
Counsel of Record
STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of
Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
(808) 527-5688

Attorneys for Respondent

QUESTIONS PRESENTED

1. Did the courts below err in concluding that Petitioners do not have a property interest in Queen's Beach that is protected under the Fifth Amendment to the United States Constitution?

2. Did the courts below err in concluding that certain of Petitioners' claims are not ripe for federal adjudication?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

A. The Subject Property: Queen's Beach 4

B. Kaiser's Interest 4

C. Land Use Plans Applicable To Queen's Beach 5

D. Zoning Ordinances Applicable To Queen's Beach 8

E. Efforts To Develop Queen's Beach 8

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 10

I. THE COURTS BELOW PROPERLY CONCLUDED THAT KAISER DOES NOT HAVE A PROPERTY INTEREST IN QUEEN'S BEACH THAT ENTITLES IT TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 10

A. Kaiser's Characterizations Of Its Rights Under The Development Agreement Are, At Best, Unsupported; And, At Worst, Misstatements Of The Agreement's Unambiguous Terms 17

TABLE OF CONTENTS (continued)

Page

II. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF KAISER'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION 20

A. Kaiser Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Kaiser Ever Sought A Variance From Preservation Zoning 21

B. The Futility Exception Does Not Excuse Kaiser From Meeting The Final Decision Requirement 24

C. Kaiser Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Pages**

Agins v. City of Tiburon,
447 U.S. 255 (1980) 26

Allen v. City and County of Honolulu,
58 Haw. 432, 571 P.2d 328 (1977) 28

Am. Savings and Loan Ass'n v. County of Marin,
653 F.2d 364 (9th Cir. 1981) 24

Austin v. City and County of Honolulu,
840 F.2d 678 (9th Cir.), *cert. denied*,
488 U.S. 852 (1988) 22, 23, 27, 28, 29, 30

City and County of Honolulu v. Chun,
54 Haw. 287, 506 P.2d 770 (1973) 28, 29

Commissioner v. McCoy,
484 U.S. 3, *reh'g denied*,
484 U.S. 982 (1987) 5, 18

Comtronics, Inc. v. Puerto Rico Tel. Co.,
409 F. Supp. 800 (D.P.R. 1975),
aff'd, 553 F.2d 701 (1st Cir. 1977) 11, 15

Corn v. City of Lauderdale Lakes,
816 F.2d 1514 (11th Cir. 1987),
aff'd, 904 F.2d 585 (11th Cir. 1990) 28

Culebras Ent. Corp. v. Rivera Rios,
813 F.2d 506 (1st Cir. 1987) 27

Hawaii Housing Auth. v. Lyman,
68 Haw. 55, 704 P.2d 888 (1985) 17, 20

Herrington v. Sonoma County,
834 F.2d 1488 (9th Cir. 1987),
modified, 857 F.2d 567 (9th Cir. 1988),
cert. denied, 489 U.S. 1090 (1989) 22, 23, 24, 26

TABLE OF AUTHORITIES (continued)

Cases: **Pages**

Himelstein v. City of Ft. Wayne,
898 F.2d 573 (7th Cir. 1990) 27

Hoehne v. County of San Benito,
870 F.2d 529 (9th Cir. 1989) 22, 27, 28

Honolulu Memorial Park, Inc. v. City and County of Honolulu,
50 Haw. 189, 436 P.2d 207 (1967) 28, 29

Hooten v. United States,
405 F.2d 1167 (5th Cir. 1969)
(per curiam) 11, 16

Inv. Annuity, Inc. v. Blumenthal,
609 F.2d 1 (D.C. Cir. 1979),
cert. denied, 446 U.S. 981 (1980) 11

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 4

Kaiser Dev. Co. v. City and County of Honolulu,
649 F. Supp. 926 (D. Haw. 1986) . . . . . *passim*

Kaiser Dev. Co. v. City and County of Honolulu,
898 F.2d 112 (9th Cir. 1990) . . . . . *passim*

Kaiser Dev. Co. v. City and County of Honolulu,
913 F.2d 573 (9th Cir. 1990) *(per curiam)* 3, 25

Kearney & Trecker Corp. v. United States,
688 F.2d 780 (Ct. Cl. 1982),
cert. denied, 460 U.S. 1051 (1983) 11

TABLE OF AUTHORITIES (continued)

Cases: **Pages**

Kinzli v. City of Santa Cruz,
818 F.2d 1449, *modified*, 830 F.2d 968
(9th Cir. 1987), *cert. denied*, 484 U.S.
1043 (1988) 21, 22, 23, 24, 27

Klein v. United States,
375 F.2d 825 (Ct. Cl. 1967), *cert. denied*, 389 U.S.
1037, *reh'g denied*, 390 U.S. 975 (1968) 11

Lai v. City and County of Honolulu,
841 F.2d 301 (9th Cir.), *cert. denied*,
488 U.S. 994 (1988) 22, 23, 29, 30

Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.,
878 F.2d 1360 (11th Cir. 1989), *cert. denied*,
___ U.S. ___, 110 S. Ct. 1132 (1990) 28

Lake Nacimiento Ranch Co. v. County of
San Luis Obispo,
830 F.2d 977, *amended*, 841 F.2d 872
(9th Cir. 1987), *cert. denied*, 488 U.S.
827 (1988) 22, 23, 24, 27

Lerman v. City of Portland,
675 F. Supp. 11 (D. Me. 1987), *aff'd*,
879 F.2d 852 (1st Cir.), *cert. denied*,
___ U.S. ___, 110 S. Ct. 243, *reh'g denied*,
___ U.S. ___, 110 S. Ct. 527 (1989) 27

Littlefield v. City of Afton,
785 F.2d 596 (9th Cir. 1986) 27

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340, *reh'g denied*, 478 U.S.
1035 (1986) 2, 22, 23, 26

Martino v. Santa Clara Valley Water Dist.,
703 F.2d 1141 (9th Cir.), *cert. denied*,
464 U.S. 847 (1983) 2, 24

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) 3, 11

TABLE OF AUTHORITIES (continued)

Cases:	Pages
Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933)	11, 15
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	18
Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization, 63 Haw. 444, 630 P.2d 107 (1981)	6, 8
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923)	3, 11, 12, 13, 15, 16
Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)	11, 15
PVM Redwood Co., Inc. v. United States, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983)	11, 13, 14, 15
Sandy Beach Defense Fund, et al. v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989)	20
Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988)	22, 23
Singleton v. Wulff, 428 U.S. 106 (1976)	5, 18
T.O.F.C., Inc. v. United States, 683 F.2d 389 (Ct. Cl. 1982)	11, 15
United States v. Grand River Dam Auth., 363 U.S. 229, *reh'g denied*, 364 U.S. 855 (1960)	11, 13, 14, 15
United States v. 180.37 Acres of Land, 254 F. Supp. 209 (W.D. Va. 1966)	11
United States v. Sec. Indus. Bank, 459 U.S. 70 (1982)	10

TABLE OF AUTHORITIES (continued)

Cases: **Pages**

United States v. 677.50 Acres of Land, 420 F.2d 1136 (10th Cir.), *cert. denied*, 398 U.S. 928 (1970) 15, 16

United States v. 6.321 Acres of Land, 479 F.2d 404 (1st Cir. 1973) 11

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) . . . . . *passim*

Windward Partners v. Ariyoshi, 693 F.2d 928 (9th Cir. 1982), *cert. denied*, 461 U.S. 906 (1983) 11

Constitutional Provisions:

U.S. Const. art. 1, § 10, cl. 1 . . . . . 1, 2

U.S. Const. amend. V . . . . . *passim*

U.S. Const. amend. XIV 1, 2, 3

Federal Statutes:

42 U.S.C. § 1983 (1982) 1

State Statutes:

Haw. Rev. Stat. § 46-123 (1985) 20

Haw. Rev. Stat. § 101-3 (1985) 29

Haw. Rev. Stat. § 516-1 (1985) 20

Ordinances, Resolutions and Charter Provisions:

City and County of Honolulu Ordinance No. 2443 (May 7, 1964) 5

City and County of Honolulu Ordinance No. 2473 (July 23, 1964) 5

TABLE OF AUTHORITIES (continued)

Ordinances, Resolutions and Charter Provisions: **Pages**

City and County of Honolulu Ordinance No. 2808 (June 8, 1966) 5

City and County of Honolulu Ordinance No. 4517 (October 28, 1975) 6

City and County of Honolulu Ordinance No. 83-6 (May 10, 1983) 8

City and County of Honolulu Ordinance No. 84-5 (March 1, 1984) 8

City and County of Honolulu Resolution No. 238 (February 2, 1977) 6

City and County of Honolulu Resolution No. 82-188 (December 23, 1982) 6

1959 Charter of the City and County of Honolulu § 5-512 6

1973 Rev. Charter of the City and County of Honolulu § 5-407 7

1973 Rev. Charter of the City and County of Honolulu § 5-408 7

1973 Rev. Charter of the City and County of Honolulu § 5-412 7

1973 Rev. Charter of the City and County of Honolulu § 6-1009 23

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

By complaint dated August 24, 1984, Petitioners Kaiser Development Company, KACOR Development Corporation, and Kaiser Hawaii Kai Development Company (collectively "Kaiser") initiated this action against Respondent City and County of Honolulu ("the City"). Read liberally, Kaiser's complaint sought relief pursuant to 42 U.S.C. § 1983 based on allegations that the City's land use regulations and other conduct violated Kaiser's rights involving a certain parcel of land known as "Queen's Beach" under the Fifth and Fourteenth Amendments to and the Contract Clause of the United States Constitution.[1]

Thereafter, the City filed motions for summary judgment pertaining to all claims of Kaiser, in addition to those of Bishop. In its decision on the City's motions, the United States District Court for the District of Hawaii (Honorable Samuel P. King, Judge) held as follows:

> Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

---

[1] Richard Lyman, Jr., et al., Trustees of the Bernice P. Bishop Estate ("Bishop"), filed an intervening complaint in this case on July 19, 1985. The claims of Bishop parroted those of Kaiser.

Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926, 949 (D. Haw. 1986) (Petitioners' Appendix at 43a).[2] In accordance with its holding, the district court granted summary judgment against Kaiser[3] on all of its claims.[4]

Kaiser appealed to the Court of Appeals for the Ninth Circuit from the district court's decision granting summary judgment against it on its Fifth Amendment taking claim and its Fourteenth Amendment substantive due process claim.[5] Specifically, Kaiser appealed from the findings that it does not have a protected property interest in Queen's Beach and that its claims are not ripe for federal court review. The court of appeals affirmed for the reasons stated in the district court's decision. *Kaiser Dev. Co. v. City and County of*

---

[2] "Appendix" references throughout this brief are to the decisions below as set forth in Petitioners' appendix.

[3] However, relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146-47 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), the district court held that Bishop's "inequitable precondemnation activities" claim was not subject to the Supreme Court's "finality" requirements, *see, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and denied summary judgment *only as to that claim*. Contrary to Kaiser's statement that "[t]he court also summarily dismissed all of Bishop's claims except those for unconstitutional exactions and inequitable precondemnation activities," *see* Kaiser's Petition, p. 3 n.3, the court's finding did not, and still does not, support the statement that a claim of unconstitutional exaction was involved at the trial level:

> In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning *inequitable precondemnation activities*.

649 F. Supp. at 949 (Appendix 43a) (emphasis added).

[4] As Kaiser correctly points out, *see* Kaiser's Petition, p. 3 n.3, because summary judgment was granted against it on all of its claims it did not participate in the trial, which resulted in a directed verdict for the City. (Appendix 48a-53a).

[5] At that point, Kaiser abandoned any Fourteenth Amendment procedural due process or equal protection claims in addition to any claim pursuant to the Contract Clause.

Honolulu, 898 F.2d 112, 113 (9th Cir. 1990) (Appendix 46a).[6] In reaching its decision, the court of appeals reviewed relevant cases decided subsequent to the district court's decision and concluded that none of those cases changed the validity of the district court's reasoning. *Id.* (Appendix 46a-47a).[7]

Following the decision by the court of appeals, Kaiser filed a petition for reconsideration and suggestion for rehearing *en banc*. Therein, Kaiser challenged the court's conclusion that certain of Kaiser's claims are not ripe for federal adjudication.[8] Kaiser's petition for reconsideration was denied, and Kaiser's suggestion for rehearing *en banc* was rejected. *Kaiser Dev. Co. v. City and County of Honolulu*, 913 F.2d 573, 574 (9th Cir. 1990) *(per curiam)* (Appendix 65a-66a).

Bishop has now petitioned this Court for a writ of certiorari.[9]

---

[6] Kaiser's assertions that it is "left guessing as to the Ninth Circuit's rationale" and that the decision by the court of appeals is "devoid of analysis" are groundless. *See* Kaiser's Petition, p. 2 n.2. In holding that "[t]he decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986)," 898 F.2d at 113 (Appendix 46a), the court of appeals adopted the rationale and the thorough analysis set forth in the district court's lengthy decision. *See* Appendix 1a-44a.

[7] Kaiser criticizes the court of appeals for overlooking "key" cases. *See* Kaiser's Petition, p. 2 n.2. The cases to which Kaiser makes reference, *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), were discussed at length in the district court's decision granting summary judgment against Kaiser on all of its claims, a decision the court of appeals affirmed. Hence, those cases were not overlooked, but addressed by reference. The decision by the court of appeals makes it perfectly clear that the cases listed therein are cases "decided since the date of [the district court's] decision." 898 F.2d at 113 (Appendix 46a). Further, if Kaiser truly believed that the court of appeals overlooked key cases, Kaiser surely would have brought those cases to the court's attention in its petition for reconsideration. However, Kaiser's petition failed to cite those cases.

[8] Kaiser did not petition the court of appeals to reconsider or to rehear *en banc* the property interest issue.

[9] Kaiser has now abandoned any Fourteenth Amendment substantive due process claim.

STATEMENT OF FACTS[10]

A. The Subject Property: Queen's Beach

Bishop owns approximately 6,000 acres of land, now known as "Hawaii Kai," on the island of Oahu, State of Hawaii.[11] The subject property is a 209.4 acre parcel in Hawaii Kai known as "Queen's Beach." Queen's Beach is vacant, undeveloped land.

B. Kaiser's Interest

On April 27, 1961, Bishop and Kaiser entered into an agreement (the "Development Agreement"),[12] which is the sole source of Kaiser's claimed property interest in Queen's

---

[10] Kaiser contends that "[a]ll the *facts* [in its petition] must be viewed in the light most favorable to Kaiser since this petition seeks review of a motion for summary judgment." *See* Kaiser's Petition, p. 4 n.4 (emphasis added). The City agrees with Kaiser's contention to the extent that "facts" recited in Kaiser's petition were "facts" before the district court, which is not always the case, and to the extent that "facts" recited in Kaiser's petition, if presented below, are accurately represented in the petition, which is rarely the case.

[11] As Kaiser points out, *see* Kaiser's Petition, p. 5 n.9, the question of the taking of property in Hawaii Kai has been before this Court previously. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The similarity ends there, however. In *Kaiser Aetna*, the Court found a taking through physical invasion of a privately owned marina. *Id.* at 180. No claim of physical invasion is being made in this case.

[12] Despite countless references to the operative contract between Kaiser and Bishop, in briefs, motions, arguments, exhibits, testimony, court decisions and, indeed, Kaiser's own internal documents, as the "Development Agreement," Kaiser now refers to it as the "assignment." One would hope that Kaiser is not under the impression that a shift in labelling will add what it would like to the substance and meaning of the agreement as interpreted by the trial court and affirmed by the court of appeals. Semantic legerdemain, a practice of those in the uncomfortable position of trying to make something out of nothing, does not add substance to claims otherwise meritless. *See infra* Section I.

Beach.[13] The Development Agreement designates Kaiser as Bishop's "independent contractor to subdivide, develop and improve" Hawaii Kai.[14] The Development Agreement also provides that Kaiser is obligated to obtain necessary governmental approvals in order to proceed with development of any parcel in Hawaii Kai.

The nature and extent of Kaiser's interest in Queen's Beach is well-defined in the Development Agreement: Kaiser has no interest in the title to Queen's Beach; Kaiser has no leasehold interest in Queen's Beach; while Kaiser has a right of access for specific purposes, Kaiser has no possessory interest in Queen's Beach; and Kaiser has no lien on Queen's Beach. Kaiser merely holds the contractual right, not the obligation, to develop Hawaii Kai, including Queen's Beach, and only if it secures the necessary approvals from Bishop and the City, and if it wishes to undertake the risk and expense of such development.

C. Land Use Plans Applicable To Queen's Beach

As required by the 1959 Charter of the City and County of Honolulu, a General Plan for Oahu was enacted by ordinance effective May 7, 1964 ("1964 General Plan"). Immediately thereafter, a Detailed Land Use Map for the Hawaii Kai area was enacted, which was later amended ("1966 DLUM"). The 1966 DLUM showed potential land uses for Hawaii Kai. It designated approximately 100 acres of Queen's

---

[13] If, in fact or law, *Bishop* is precluded from directly developing its own property as a condition of maintaining its tax status, *see* Kaiser's Petition, pp. 4, 5, that claim was not presented in any form to the district court during its consideration of the City's motion for summary judgment, or to the court of appeals. Accordingly, it should have no bearing on this Court's consideration of whether the district court erred in granting summary judgment against Kaiser. *See Commissioner v. McCoy*, 484 U.S. 3, 6, *reh'g denied*, 484 U.S. 982 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Moreover, one is hard-pressed to understand why that claim, even if it has any merit, would be relevant, even fleetingly, to the issues presented by Kaiser.

[14] The designation was not "to subdivide, develop, improve *and use*," as Kaiser claims in its petition. *See* Kaiser's Petition, p. 3 (emphasis added).

Beach for future resort use, five acres for future commercial use, and ninety-five acres for park and golf course use.

Effective January 2, 1973, the Revised Charter of the City and County of Honolulu ("1973 Charter"), as approved by the City's citizens, by a referendum vote held on November 7, 1972, became law, supplanting the 1959 Charter. On October 28, 1975, the City amended by ordinance the 1964 General Plan to clarify that DLUM's were not to be regarded as zoning maps, and were not to be considered as having priority over the provisions of the General Plan. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

On February 2, 1977, pursuant to the 1973 Charter, a General Plan for the City ("1977 General Plan") was adopted by resolution of the City Council.[15] That General Plan specifically identified Queen's Beach as a possible site for future resort development. On December 23, 1982, also pursuant to the 1973 Charter, the 1977 General Plan was amended ("1982 General Plan"). The 1982 General Plan differed from the 1977 General Plan in several respects, including the fact that Queen's Beach was not specified as a possible site of future resort development. Hence, until the passage of the 1982 General Plan, portions of Queen's Beach were planned for future resort use, but the zoning for all of Queen's Beach, while permitting residential use, did not permit resort use.[16]

---

[15] The 1973 Charter provides that the General Plan contain:

> [T]he city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, state or federal. The statements shall include but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[16] For a full discussion of zoning ordinances applicable to Queen's Beach *see infra* Statement of Facts, Section D.

As also required by the 1973 Charter, the City began in 1977 the process of formulating Development Plans for all areas of the City, including East Honolulu, which encompasses all of Hawaii Kai, including Queen's Beach.[17] In 1979, the City's Department of General Planning ("DPG") made public its proposed Development Plan Land Use Map for East Honolulu. This Development Plan Land Use Map proposed that a portion of lower Queen's Beach be designated for future resort uses and that the remainder of the property be designated for future preservation uses. In 1980, DGP proposed another Development Plan Land Use Map for East Honolulu containing the same designations for Queen's Beach ("1980 Proposed DP"). This proposed plan was submitted to the City Council, which, pursuant to the 1973 Charter, was required to enact Development Plans as ordinances. The 1980 Proposed DP was not adopted by City Council. Instead, the City Council passed a Development Plan Land Use Map for East Honolulu that was essentially consistent with a proposed land use plan submitted by Kaiser (without, incidentally, Bishop's approval) and that designated a portion of Queen's Beach for future resort uses and the remainder for future single-family residential uses. This Development Plan was vetoed by the Mayor (along with all but one of the seven other proposed Development Plans for the Island of Oahu passed by the City Council at the same time), for, among other reasons, its failure to adequately reflect the requirements of the 1977 General Plan.

In April, 1982, after reviewing input from both Bishop and Kaiser, DGP made public another proposed Development Plan Land Use Map for East Honolulu ("1982 Proposed DP"), which eliminated future resort uses at Queen's Beach. Instead, it proposed that approximately eighty acres of Queen's Beach be designated for future park uses and that the remaining area

---

[17] Development Plans, as they were eventually formulated, are comprised of three elements: a written portion, which describes the area to which it is applicable as well as that area's long range goals, specific problems and planned future development; a land use map, which shows in pictorial form the future land uses for the area; and a public facilities map, which shows in pictorial form the area's existing public facilities and planned future public facilities.

of Queen's Beach be designated for future preservation uses. On May 10, 1983, the 1982 Proposed DP, with minor changes, was adopted as the Development Plan Land Use Map for East Honolulu. That map reflected the fact that the 1982 General Plan had *not* identified Queen's Beach as a future resort site.

D. Zoning Ordinances Applicable To Queen's Beach[18]

Applicable zoning has at all relevant times permitted development of Queen's Beach. Beginning in 1943, Queen's Beach was zoned to permit single-family residential uses. That zoning was in effect until March 1, 1984, when the zoning of Queen's Beach was amended to permit preservation uses.[19] Preservation zoning allows many possible uses, such as public and private golf courses, vacation cabins and uses that are accessory to those uses.[20]

E. Efforts To Develop Queen's Beach[21]

Prior to 1971, Kaiser and Bishop made no effort to gain the necessary approvals to develop Queen's Beach. On or

---

[18] The City was not, as Kaiser suggests, *see* Kaiser's Petition, p. 7 n.11, required to zone Queen's Beach in conformance with the General Plan. *Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

[19] Kaiser has it backwards when it states that Queen's Beach was rezoned and then the planning designation was changed. *See* Kaiser's Petition, p. 9. In fact, the General Plan was changed first, then the Development Plan was adopted, and then Queen's Beach was rezoned, in the order prescribed by law.

[20] For a complete list of preservation uses *see* 649 F. Supp. at 929 n.4 (Appendix 4a-5a n.4).

[21] Kaiser is, perhaps, most disingenuous in its description of its efforts to develop Queen's Beach, even to the extent that it cannot maintain internal consistency. *Compare* Kaiser's Petition, p. 8 (eleven "applications") *with* p. 22 (seven "applications"). As the district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), Kaiser "made only two specific applications for zone change or development at Queen's Beach — one in 1971, which [it] did not follow through on, and one in 1983, which was denied following the adoption of the East Honolulu Development Plan.

(continued)

about February 8, 1971, they applied to the City for a zone change on sixteen parcels in Hawaii Kai, including a request that 42.4 acres of lower Queen's Beach be rezoned for resort and commercial uses. That application was met with substantial public opposition, including that of elected State legislators. The City deemed that application to be withdrawn by Kaiser as of July 10, 1971.[22]

No application has ever been submitted to the City to develop lower Queen's Beach in accordance with applicable zoning.[23] Only one application was ever submitted to the City to develop upper Queen's Beach, and that was submitted on March 18, 1983, in an obvious race of diligence with the proposed East Honolulu Development Plan, seeking approval to develop a single-family residential subdivision across approximately 120 acres of upper Queen's Beach. This one application was denied on May 19, 1983, after the May 10, 1983 enactment of the East Honolulu Development Plan had designated that portion of Queen's Beach for preservation uses.[24] Kaiser appealed the denial to the zoning board of appeals, which upheld the denial on March 8, 1984. Kaiser never appealed that denial to Hawaii's state courts.

---

[21] (continued)
[Kaiser has] made no attempt to apply for development permits, zoning changes, or variances at Queen's Beach under its present zoning." 649 F. Supp. at 941-42 (Appendix 29a). For the effect of the latter failures on the ripeness of Kaiser's claims *see infra* Section II.A.

[22] By stating that neither of its applications "was granted by the City," *see* Kaiser's Petition, p. 8, Kaiser conveniently fails to mention that the 1971 application was deemed withdrawn.

[23] Lower Queen's Beach is the "makai," or "toward the ocean," portion of Queen's Beach comprised of roughly eighty acres.

[24] Kaiser's assertion that this application was denied because "the City adopted and implemented an extortionate official policy that prohibited any economically viable use of property in Hawaii Kai unless the ocean frontage of Queen's Beach was dedicated for free to the City for a public park," *see* Kaiser's Petition, p. 9, is groundless. The 1983 application was denied on specified grounds set forth in a written decision, none of which were in any way related to proposed dedication of property. Moreover, Kaiser did not see fit to challenge that decision in Hawaii's state courts.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURTS BELOW PROPERLY CONCLUDED THAT KAISER DOES NOT HAVE A PROPERTY INTEREST IN QUEEN'S BEACH THAT ENTITLES IT TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

By affirming the district court's decision granting summary judgment against Kaiser "for the reasons stated by Judge King," 898 F.2d at 113 (Appendix 46a), the court of appeals affirmed the district court's finding that "Kaiser does not have a property interest in Queen's Beach." 649 F. Supp. at 949 (Appendix 43a). Although Kaiser disagrees with that finding and has petitioned for a writ of certiorari on that basis, the courts below have reached the right conclusion.

In order to allege a viable inverse condemnation claim under the Fifth Amendment, a plaintiff must have a compensable interest in the physical thing that has allegedly been taken. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75-76 (1982). Kaiser clearly does not have a compensable property interest in Queen's Beach. Kaiser merely has a contract—the Development Agreement—which has as its subject matter Hawaii Kai, of which Queen's Beach is a part, but which in no way gives Kaiser a compensable property interest in Queen's Beach. Even if all of the allegations contained in Kaiser's inverse condemnation claim, except those regarding alleged "property rights," are assumed to be true, the City has, as a matter of law, merely frustrated Kaiser's contract with Bishop.

In essence, Kaiser claims that the City, through inverse condemnation, has "taken" Queen's Beach itself, as opposed to the Development Agreement, and has thereby allegedly destroyed Kaiser's opportunity to exploit its bargain with Bishop. Such inverse condemnation claims must fail, as a matter of law, because they "confound the contract with its

subject-matter." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923). *See also United States v. Grand River Dam Auth.*, 363 U.S. 229, *reh'g denied*, 364 U.S. 855 (1960); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert denied*, 459 U.S. 1106 (1983); *Windward Partners v. Ariyoshi*, 693 F.2d 928 (9th Cir. 1982), *cert. denied*, 461 U.S. 906 (1983); *Kearney & Trecker Corp. v. United States*, 688 F.2d 780 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1051 (1983); *T.O.F.C., Inc. v. United States*, 683 F.2d 389 (Ct. Cl. 1982); *Klein v. United States*, 375 F.2d 825 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1037, *reh'g denied*, 390 U.S. 975 (1968); *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *United States v. 6.321 Acres of Land*, 479 F.2d 404 (1st Cir. 1973); *Hooten v. United States*, 405 F.2d 1167 (5th Cir. 1969) (*per curiam*); *Comptronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977); *United States. v. 180.37 Acres of Land*, 254 F. Supp. 209 (W.D. Va. 1966). This rule of law is well-established, widely-held, and clearly applicable to Kaiser's inverse condemnation claim.

Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923), and its progeny, for example, *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960) and *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933), are dispositive of this issue.[25] In *Omnia*, the plaintiff ("Omnia") was a party to a contract with Allegheny Steel Company ("Allegheny"), by which it acquired the right to purchase a large amount of

[25] Kaiser's assertion that the court of appeals "ignored" *Omnia* and *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), is unavailing. *See supra* note 7 and accompanying text. Further, contrary to Kaiser's claim, the district court did not "erroneously distinguish *Monongahela*." *See* Kaiser's Petition, p. 16 n.24. The district court distinguished *Monongahela* for the same reason given by the *Omnia* Court. Namely, in *Monongahela*, the franchise was " 'not merely a contract in respect of the property taken, but was an integral part of it,' " and the government had taken the tangible property of the plaintiff. 649 F. Supp. at 935 n.8 (Appendix 17a n.8) (quoting *Omnia*, 261 U.S. at 513).

steel plate from Allegheny, at a bargain price. 261 U.S. at 507. The Court found that "[t]he contract was of great value and if carried out would have produced large profits [for Omnia]." *Id.* Shortly after Omnia entered into the contract, and before Allegheny had delivered any steel to Omnia, the federal government requisitioned Allegheny's entire production of steel plate for the following year, directed Allegheny not to comply with the terms of its contract with Omnia, and declared that if Allegheny attempted to deliver steel plate to Omnia the government would take over Allegheny's entire plant. *Id.*

Omnia sued the federal government, alleging that the government had taken the steel plate, which was Omnia's by right of contract, without payment of just compensation and, thus, in violation of the Fifth Amendment. *Id.* at 508. The Court concluded that Omnia's taking claim was without merit because Omnia did not have a compensable property interest in the steel plate, but rather only an interest in its contract with Allegheny. *Id.* at 510-11. The Court ruled that "[a]s a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended." *Id.* at 511.

Allegheny's steel plate is, by analogy, Bishop's Queen's Beach. Omnia and Kaiser both acquired certain contractual rights with respect to allegedly taken property by contracting with the property's owner. Omnia claimed to have lost a large amount of money because the steel plates were requisitioned. Similarly, Kaiser alleges a significant monetary loss as a result of the alleged taking of Queen's Beach. Yet, *Omnia* is clear: Omnia's right to derive financial gain from the allegedly taken property, which was the subject matter of its contract with the property's owner, did not itself constitute "property" within the meaning of the Fifth Amendment. *Id.* at 510-11. Omnia merely owned a contract right. Similarly, Kaiser owns nothing more than the contractual right to derive financial gain through the development of the allegedly taken property. At worst, the City has, for now, rendered the

further performance of Kaiser's Development Agreement impossible as to one small portion of Hawaii Kai.[26]

The Ninth Circuit followed *Omnia* and *Grand River Dam Auth.* in *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). In that case, the PVM Redwood Co. ("PVM"), a sawmill operator, sued the federal government, alleging that the passage of the Redwood Park Expansion Act caused a taking of its property without payment of just compensation in violation of the Fifth Amendment. 686 F.2d at 1328. PVM alleged that it had entered into a contract with Louisiana-Pacific Corporation ("Lousiana-Pacific") and Simpson Timber Company ("Simpson"), whereby Louisiana-Pacific and Simpson agreed to supply PVM with raw materials that, according to PVM, amounted to ninety-eight percent of PVM's need for raw materials. *Id.* The federal government subsequently condemned Louisiana-Pacific's and Simpson's lands for national park expansion and Louisiana-Pacific and Simpson were, consequently, unable to furnish PVM with raw materials. *Id.* As a result of the taking, PVM alleged that it suffered an increase in production costs because it now had to work with an inferior grade of lumber and it had to retool and purchase new machinery to handle the inferior lumber. *Id.*

The district court dismissed PVM's inverse condemnation action for failure to state a claim upon which relief could be granted because "no property right held by PVM had been taken by the Government." *Id.* On appeal, the Ninth Circuit began its analysis by stating that:

> "PVM has failed to distinguish between 'appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power.' "

Id. at 1329 (quoting *Grand River Dam Auth.*, 363 U.S. at 236). The Ninth Circuit affirmed the district court's dismissal, holding that PVM had no compensable property interest in the

[26] In fact, unlike Omnia, Kaiser retains its contract right to derive financial gain from the subject matter of its contract. It can, and has, developed other portions of Hawaii Kai since the alleged "taking" by the City.

lands taken by the federal government. 686 F.2d at 1329. The Ninth Circuit found that PVM had lost only " 'a prospective business opportunity.' " *Id.* (quoting *Grand River Dam Auth.*, 363 U.S. at 236).

Similarly, that is all Kaiser has lost, assuming for purposes of this argument that its allegations concerning the effect of the City's regulations are true. It has lost an opportunity to make a financial gain by developing a portion of someone else's property.

Of course, a lost opportunity may also translate into the loss of funds already invested in anticipation of capitalizing on that opportunity. This was the situation, allegedly, in *PVM Redwood.* PVM claimed to have invested in machinery and equipment in anticipation of a longer relationship with its suppliers, Louisiana-Pacific and Simpson. 686 F.2d at 1328. When the government effectively brought those relationships to an end, PVM's investment in those relationships was, to some degree, lost. For the purposes of the Ninth Circuit's analysis, PVM's lost investment was of no significance, *id.* at 1329; PVM could not convert its mere contract rights in the taken property to a constitutionally-protected property right in the taken property by investing money in reliance upon the contract. Rather, as the controlling case law clearly holds, it is only the character of the claimant's interest in the subject property that creates a protectable property interest under the Fifth Amendment, not the nature or extent of the investment in the claimant's interest.

Kaiser alleges that it has invested significant funds in preparing Queen's Beach for development. *See* Kaiser's Petition, pp. 6, 7. That investment represents a business risk taken by Kaiser.[27] The plaintiffs in *PVM Redwood* and in many

---

[27] The district court's finding on this point could not be clearer. The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that:

> Even assuming that costs Kaiser has invested in infrastructure elsewhere in Hawaii Kai can be properly allocated to the anticipated development, this investment represents a business risk undertaken by Kaiser. Kaiser cannot turn a contract right into
>
> *(continued)*

other cases following *Omnia* also invested significant amounts of money in anticipation of exploiting the full extent of their bargain with the property owners. However, the law is clear: a contracting party cannot convert a contract right into a compensable property right by investing money in the subject matter of the contract in reliance upon the contract. *See, e.g., United States v. Grand River Dam Auth.*, 363 U.S. 229, *reh'g denied*, 364 U.S. 855 (1960); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983); *United States v. 677.50 Acres of Land*, 420 F.2d 1136 (10th Cir.), *cert. denied*, 398 U.S. 928 (1970); *T.O.F.C., Inc. v. United States*, 686 F.2d 389 (Ct. Cl. 1982); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977).

The holding in *United States v. 677.50 Acres of Land* is a prime example of the application of this well-established rule of law. In that case, the plaintiff ("Clear Creek") was a pipeline company formed to transport oil from land leased by oil producers to gathering stations, in order to provide a market for the oil producers on those lands. 420 F.2d at 1137. Clear Creek laid the pipelines from the leased lands to the gathering stations and entered into division order contracts with all operators, working interest owners and royalty owners served by the pipelines. *Id.* Each contract included a provision that the contract would be irrevocable until 4.5 million barrels of oil ran through the pipelines. *Id.* That particular clause was incorporated to insure repayment of Clear Creek's investment in the pipeline. *Id.*

The federal government appropriated the leased lands after approximately seventy-three percent of the 4.5 million barrel quota had been met, thereby making it impossible for Clear Creek to recover its investment in the pipeline. *Id.* Clear

---

[27] (continued)

> a property right simply by investing in the subject matter of the contract.

649 F. Supp. at 933 (Appendix 12a) (citing *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1275-76 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)).

Creek sued the government alleging that its property had been taken for public use without payment of just compensation in violation of the Fifth Amendment. The court held that Clear Creek did not have a compensable property interest in the condemned lands. *Id.* Relying upon the Supreme Court's decision in *Omnia*, the court reasoned that Clear Creek had "confuse[d] the contracts with their subject matter," and in actuality merely possessed a contractual right with respect to the taken property, which was frustrated by the government's action. *Id.* The court specifically found that the claimant's underlying investment and the irrevocability clauses in the division order contracts did not elevate the stature of Clear Creek's contract rights to that of an interest or estate in the condemned lands. *Id.*

Hooten v. United States, 405 F.2d 1167 (5th Cir. 1969) *(per curiam)*, is another instructive case. In *Hooten*, the plaintiff ("Hooten") owned a real estate agency that had management contracts with the owners of four tenement properties on a certain tract of land. *Id.* at 1168. These contracts required Hooten's agency to perform certain tasks in exchange for a portion of the collected rents. *Id.* The federal government condemned these properties, and Hooten sued under the Fifth Amendment alleging that his interest in the properties, acquired through the management contracts, was taken without just compensation. The court concluded, after citing *Omnia* and other Supreme Court precedent, that:

> The mandate of the Supreme Court is clear and, accordingly, we hold that Hooten is not entitled to compensation for the contracts lost as a result of the takings in fee.

Id. at 1169. Like Kaiser, Hooten was one step removed from the subject real property, possessing only a contractual right to derive revenues from exploitation of the subject property. The court of appeals held that Hooten did not possess a compensable right in the underlying real property. Accordingly, Kaiser does not have a compensable right in the underlying real property at issue, Queen's Beach.

A. Kaiser's Characterizations Of Its Rights Under The Development Agreement Are, At Best, Unsupported; And, At Worst, Misstatements Of The Agreement's Unambiguous Terms.

Kaiser's petition exaggerates and mischaracterizes Kaiser's interest in Queen's Beach in an obvious attempt to bring whatever interest it has within the protection of the Fifth Amendment.[28]

First, Kaiser contends in at least one instance that it has "possession" of Queen's Beach. *See* Kaiser's Petition, p. 14. Kaiser does not possess Queen's Beach. Bishop owns Queen's Beach and remains the landowner and lessor of Kaiser's completed developments. What Kaiser has in actuality is a right of access for a specific purpose—to develop improvements thereon. To label such a contractual right of access a possessory interest is an untenable leap.[29]

Kaiser also contends that it has the right to lease developed lots or to sell that right to lease. *See* Kaiser's Petition, p. 6. Contrary to Kaiser's contention, Kaiser has the contractual right to designate certain numbers of lessees to whom Bishop *may* lease, but not the right to convey an interest in Queen's Beach by lease. Bishop executes all leases. Of course, Kaiser may sell its right to develop, together with its contractual benefit of being able to designate certain numbers of lessees. It is not, however, in any position to sell any right to lease, because it does not hold that right.

---

[28] To the extent that Kaiser is worried about being "remediless," *see* Kaiser's Petition, p. 16, Kaiser's remedy for breach of its contractual rights, including its contractual right to reimbursement for its out-of-pocket losses, is, of course, a suit against Bishop for breach of the Development Agreement. *See, e.g., Hawaii Housing Auth. v. Lyman*, 68 Haw. 55, 77-78, 704 P.2d 888 (1985).

[29] Kaiser also states that "Queen's Beach was selected early on by Kaiser for resort development." *See* Kaiser's Petition, p. 3. Under the Development Agreement, Kaiser has the right to "select" tracts of land for development. Tract selection simply gives Kaiser the ability to proceed to subsequent planning steps in the development process. It gives Kaiser no interest in the land.

Kaiser goes out even further on its already imaginary limb by claiming that it has a right to sell leasehold estates. *See* Kaiser's Petition, p. 6. Kaiser has no right to dispose of the property. At best, Kaiser may, with Bishop's consent, assign or sublet lots that it has leased from Bishop.

In its petition, Kaiser also claims, for the very first time,[30] that it has a right to "use" Queen's Beach. This Court, for purposes of determining whether summary judgment was properly granted, should not consider arguments not made before the courts below. *See Commissioner v. McCoy,* 484 U.S. 3, 6, *reh'g denied,* 484 U.S. 982 (1987); *Singleton v. Wulff,* 428 U.S. 106, 120 (1976). In any event, Kaiser's new claim is without merit. As the cases cited by Kaiser make clear, *see* Kaiser's Petition, p. 12 n.18 (citing *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987) ("[P]roperty owners have the right to use property. . . ."), a right to use property derived from property ownership is undoubtedly a protected property right. Kaiser does not, however, have the right to use Queen's Beach. To begin with, Kaiser does not own Queen's Beach. Nor can Kaiser do any of the things associated with a right to use. For example, Kaiser cannot dispose of the property, by sale or by lease, and Kaiser has neither possession of nor unlimited access to Queen's Beach. Kaiser cannot even develop Queen's Beach in the manner it sees fit. Rather, Bishop controls that decision.

In short, the Development Agreement does not give Kaiser a right to "use" Queen's Beach. Rather, as Kaiser correctly points out at other places in its petition, *see, e.g.,* Kaiser's Petition, p. 18, the Development Agreement merely affords Kaiser the business opportunity to develop the land in Hawaii Kai, or, in the words of the district court, "Kaiser has the right, but not the obligation, to develop property in

---

[30] At the district court level, Kaiser asserted "the exclusive right to develop the property, possession of the property, and the right to dispose of the property." 649 F. Supp. at 932 (Appendix 10a).

Hawaii Kai at its own expense and risk." 649 F. Supp. at 933 (Appendix 12a).[31]

The very terms of the Development Agreement explicitly state that Kaiser is to have no interest in Hawaii Kai, other than that of a lessee when it leases land from Bishop. In describing the relationship between Bishop[32] and Kaiser, the Agreement states:

> This Agreement shall not be construed as creating the relationship of principal and agent between

---

[31] The mere right to develop is not a protected property right, and the district court went on to hold, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that "the development agreement itself, decisions by the Hawaii Supreme Court, and federal law all support the City's argument that Kaiser has no protectable property interest." 649 F. Supp. at 932 (Appendix 10a).

Kaiser's suggestion that this issue properly belongs in state court is incredible. *See* Kaiser's Petition, p. 14 n.21. As the district court explained, "[i]n determining whether Kaiser has a property interest that is entitled to protection under the federal constitution, *federal courts are not bound by state law.* However, federal courts look to state law for aid in determining the scope of property interests (citations omitted)." 649 F. Supp. at 932 (Appendix 10a) (emphasis added). Of the pertinent state law in this case, the district court noted that "the Hawaii Supreme Court has consistently refused to recognize Kaiser's asserted property interest, and the state court's interpretation is entitled to considerable deference in this matter." *Id.* at 934 (Appendix 14a).

Kaiser's attempt to distinguish the district court's reading of Hawaii cases, which themselves interpret Kaiser's interest in Hawaii Kai, is untenable. *See* Kaiser's Petition, p. 14 n.22. Kaiser attempts to distinguish those cases by stating that they all dealt with Kaiser's interest in land already developed by Kaiser. That distinction is really meaningless, especially since, according to Kaiser's own analysis in the case at bar, Kaiser acquires more rights in Hawaii Kai property as development progresses under the Development Agreement.

In short, Kaiser chose its forum, and, even though things have not turned out the way that Kaiser planned, Kaiser must now live with that choice.

[32] In at least two instances, Kaiser states that had Bishop not "assigned" certain rights to Kaiser, there is no doubt that Bishop would be able to pursue claims for a taking of property. *See* Kaiser's Petition, pp. 15-17. Therefore, the argument goes, having been assigned those rights, Kaiser should be able to pursue such claims. Kaiser misses the point here. Even after the "assignment" of rights to Kaiser, Bishop remains able to pursue claims for a taking of property because Bishop has retained the essential property rights.

> BISHOP and [KAISER], nor as creating a partnership, joint venture, or association of any kind between BISHOP and [KAISER], it being the purpose and intent hereof to create only a contractual relationship between BISHOP as a landowner and [KAISER] as an independent contractor to subdivide, develop and improve [Hawaii Kai]. It is contemplated that BISHOP as landowner will issue leases as lessor to the public, and to the extent that [KAISER] takes leases under and pursuant hereto, there shall be the relationship of lessor on the part of BISHOP and of lessee on the part of [KAISER], but not otherwise.

Therefore, Kaiser has no interest in property that it has not leased. Queen's Beach has never been leased to Kaiser, and, therefore, Kaiser has no interest in it.[33]

II. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF KAISER'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION.

In affirming the district court's decision granting summary judgment against Kaiser, the court of appeals stated: "The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Appendix 1a-44a]." 898 F.2d at 113 (Appendix 46a). By affirming the district court's decision granting summary judgment against Kaiser "for the reasons stated by Judge King," *id.* (Appendix 46a), the court of

---

[33] Kaiser's reliance upon state statutes in support of its so-called property rights is misplaced. *Hawaii Housing Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1925), completely undermines Kaiser's argument that the Hawaii Land Reform Act, Haw. Rev. Stat. § 516-1, converts its contract rights into protected property rights. *See* Kaiser's Petition, p. 15.

Kaiser's argument that the Hawaii Development Agreement Statute, Haw. Rev. Stat. § 46-123, recognizes a developer's property rights by allowing developers to enter into agreements with the City and "vest" their right to develop property is of no consequence to this case since Kaiser has no vested rights to development at Queen's Beach. 649 F. Supp. at 937-38 (Appendix 21a-22a). Vested rights, incidentally, are why the City did not object to Kaiser's presence in *Sandy Beach Defense Fund, et al. v. City Council of the City and County of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989). *See* Kaiser's Petition, p. 18 n.26. In that case, Kaiser had vested rights to the development at issue.

appeals affirmed the district court's dismissal of certain of Kaiser's claims based upon the finding that "[Kaiser's] claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]." 649 F. Supp. at 949 (Appendix 43a). Despite Kaiser's complaint that the ripeness doctrine is "in a state of conflict and confusion,"[34] *see* Kaiser's Petition, p. 20, the court of appeals and the district court properly found that certain of Kaiser's claims are not ripe for federal court review.

A. Kaiser Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Kaiser Ever Sought A Variance From Preservation Zoning.

Far from being "in a state of conflict and confusion," the standard for when a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is well-settled. Two conditions must be satisfied. First, such claims are not ripe until the landowner has received:

> "[A] final and authoritative determination of the type and intensity of development legally permitted on the subject property."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)

---

[34] The district court did not, as Kaiser suggests, *see* Kaiser's Petition, p. 21, ask for "clarification" of the ripeness doctrine. To the contrary, in applying the ripeness doctrine to Kaiser's claims and in concluding that those claims are not ripe, the district court explained that it was following the wisdom of Lord Denning who wrote:

> "Seek to make your opinions clear at all costs. Make them positive and definite. Not neutral or vacillating. My pupil master told me early on of the client's complaint: 'I want your opinion and not your doubts,' and of Sir George Jessel's characteristic saying: 'I may be wrong and sometimes am, but I am never in doubt.' "

649 F. Supp. at 941 n.18 (Appendix 28a) (quoting Lord Denning, *Lord Denning on the Discipline of Law* 7 (1979)).

Similarly flawed is Kaiser's complaint that the court of appeals gave no clarification of the ripeness doctrine. *See* Kaiser's Petition, p. 21. The court of appeals endorsed the district court's application of the ripeness doctrine to Kaiser's claims and the district court's conclusion that Kaiser's claims are not ripe. 898 F.2d at 113 (Appendix 46a).

(quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). *Accord Williamson County Regional Planning Comm'n*, 473 U.S. at 180, 190 n.11; *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1987); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, *amended*, 841 F.2d 872, 876 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988); *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Herrington v. Sonoma County*, 834 F.2d 1488, 1499 (9th Cir. 1987), *modified*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).[35] As this Court has explained: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. In other words, " 'the nature and extent of permitted development' " must be "expose[d]" by virtue of the municipality's final decision. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348).

---

[35] Without the benefit of elaboration, Kaiser argues that *Lake Nacimiento Ranch Co.* and *Herrington* are "utterly irreconcilable." *See* Kaiser's Petition, p. 21. Kaiser's argument is, however, unavailing. To begin with, the courts in both cases applied the so-called "final decision requirement." To the extent that the perceived conflict is that the second requirement of the ripeness doctrine was not applied in *Herrington*, the court there explained that it was not applying the requirement that the plaintiff prove that state procedures for obtaining just compensation are inadequate because no Fifth Amendment takings claims were being raised therein. 834 F.2d at 1499 n.10. Moreover, to the extent that the perceived conflict is that the courts reached different holdings regarding the ripeness of the claims before them, the explanation given by another court of its holding on the ripeness issue is most instructive:

> We emphasize that our decision here turns on the specific facts presented in this case . . . As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and this court are extremely fact-specific.

Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).

As Kaiser points out, *see* Kaiser's Petition, p. 22 n.30, the court of appeals, in affirming the district court's dismissal of certain of Kaiser's claims on ripeness grounds, considered both *Lake Nacimiento Ranch Co.* and *Herrington*, and the court of appeals found no conflict. Further, this Court, in denying certiorari to both cases, apparently found no conflict either.

The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that the Petitioners "have not submitted a development plan under the present land use regulations, which list at least twenty possible uses for the land. . . . " 649 F. Supp. at 940 (Appendix 26a-27a).[36] Kaiser has, therefore, failed to obtain a final and authoritative determination of " 'the nature and extent of permitted development' " at Queen's Beach. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348). By failing to expose the extent of permitted development, Kaiser has failed to satisfy the so-called "final decision requirement." *Herrington*, 834 F.2d at 1496.

Kaiser's shortcomings do not end there. The final decision requirement also requires a plaintiff to show that it has applied for and been denied a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 187-88; *Kinzli*, 818 F.2d at 1454). *Accord Lai*, 841 F.2d at 303; *Austin*, 840 F.2d at 680; *Shelter Creek Dev. Corp.*, 838 F.2d at 377. The district court found, 649 F. Supp. at 942 (Appendix 29a), and the court of appeals again agreed, 898 F.2d at 113 (Appendix 46a), that Kaiser has never sought a variance from the regulations at issue, although Kaiser has, despite its apparent claim to the contrary, *see* Kaiser's Petition, p. 23, been able to apply for such a variance pursuant to § 6-1009 of the 1973 Charter. As this Court stated in *Williamson County Regional Planning Comm'n:* "[I]t is impossible to determine the extent of the loss or interference until the [municipality] has decided whether it will grant a variance from the application of its regulations." 473 U.S. at 192 n.12.

Having failed to submit a development plan under the present land use regulations and having failed to apply for a variance from those regulations, Kaiser has absolutely failed to meet the final decision requirement.[37] Therefore, its taking claims are not ripe for adjudication by a federal court.

---

[36] Kaiser's fears about "the risks facing a developer wishing to undertake a new town development," *see* Kaiser's Petition, p. 7 n.10, could have been alleviated by submitting a development plan for approval.

[37] Kaiser states that it "had no reason to suspect . . . anything but extensive development at Queen's Beach . . . ." *See* Kaiser's Petition, p. 7. To the

(continued)

B. The Futility Exception Does Not Excuse Kaiser From Meeting The Final Decision Requirement.

Kaiser does not claim that it satisfied the final decision requirement. Rather, Kaiser seeks to avoid the requirement by claiming futility. The so-called "futility exception" to the final decision requirement holds that the requirement may be avoided if the plaintiff can show that an attempt to comply with the requirement would be an " 'idle and futile act.' " *Kinzli*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). The plaintiff has the " 'heavy burden' " of showing futility. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (quoting *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981)).

Kaiser cannot meet this heavy burden for the same reason that it cannot satisfy the final decision requirement. Kaiser has never made *any* application, let alone a meaningful one, pursuant to the regulations at issue, nor has it made a meaningful application for a variance from those regulations.[38] A plaintiff cannot rely on the futility exception until *at least* one "meaningful application" has been made to expose the type and intensity of development legally permitted on the subject property and *at least* one "meaningful application" has been made for a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876-77; *Herrington*, 834 F.2d at 1495-96; *Kinzli*, 818 F.2d at 1454-55.[39]

---

[37] (continued)
extent that Kaiser's suspicions were based upon planning designations and zoning ordinances, the district court, 649 F. Supp. at 937 (Appendix 21a), and the court of appeals, 898 F.2d at 113 (Appendix 46a), found that those suspicions were baseless. Of course, Kaiser could have moved beyond dealing in mere suspicions by submitting a development plan and/or applying for a variance.

[38] In this regard, Kaiser's statement that "*[f]urther* applications for development" under the regulations at issue "would be meaningless," *see* Kaiser's Petition, p. 25 (emphasis added), misrepresents the evidence.

[39] The one "meaningful application" requirement should alleviate Kaiser's concerns that "the government may say, ad infinitum: No, we will not permit this use, but that does not preclude us allowing some other use of the property." *See* Kaiser's Petition, p. 26 n.36.

In claiming futility, Kaiser states that "the City admitted that there was a significant factual dispute over the permitted viable uses of Queen's Beach."[40] *See* Kaiser's Petition, p. 23. Kaiser, in turn, argues that one cannot make a "meaningful" application to develop when none of the permitted uses would be economically viable. The problem with Kaiser's "logic" is that, given Kaiser's failure to satisfy the final decision requirement,[41] permitted uses of Queen's Beach are unknown.[42] Kaiser cannot argue futility based upon an unknown.[43]

---

[40] Kaiser questions how the district court could grant summary judgment in light of a conceded factual dispute, *see* Kaiser's Petition, p. 22, but the district court's explanation should suffice. In reaching its decision that Kaiser had failed to satisfy the ripeness doctrine, the district court stated that:

> The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe that it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

649 F. Supp. at 942 n.21 (Appendix 30a) (emphasis in original).

Kaiser, in attempting to make its futility argument, even goes so far as to misquote the district court's decision by substituting "viability" for "value." *See* Kaiser's Petition, p. 22.

[41] The district court should not, in light of Kaiser's failure to satisfy the final decision requirement, have "taken as true Kaiser's assertion that no viable uses were permitted. . . ." *See* Kaiser's Petition, p. 25 n.35.

[42] At one point, Kaiser states that "[e]ven the maximum use the City claims it would allow under the new regulation — a golf course with vacation cabins — is not economically viable." See Kaiser's Petition, p. 23. Apart from the fact that, because of Kaiser's failure to satisfy the final decision requirement, it is unknown what uses would be allowed at Queen's Beach, this statement warrants comment. The testimony at trial was that a private golf course would be economically viable, leading both courts below to conclude that Bishop had failed to offer any substantial evidence that it had no economically viable use for its property. *See* Appendix 52a and 913 F.2d at 576 (Appendix 59a).

[43] Without the benefit of citation to any authority, Kaiser also argues that "[w]hen the permitted uses under new zoning are not economically

(continued)

Kaiser has never applied for permission to develop under the challenged regulations or for a variance from the challenged regulations.[44] Therefore, the "futility exception" is not available to Kaiser.[45] That heavy burden has not been met. "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington*, 834 F.2d at 1496 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 188; *Kaiser Dev. Co.*, 649 F. Supp. at 942). With statements such as, "it is clear that no application for development would be approved," *see* Kaiser's Petition, p. 25 n.35, Kaiser merely alleges futility.

---

[43] (continued)
viable, a meaningful application is one in conformity with planning and zoning prior to the challenged unlawful conduct." *See* Kaiser's Petition, p. 25. This novel approach to the meaningful application requirement is flawed for the same reason. Permitted uses are unknown given Kaiser's failure to satisfy the final decision requirement.

[44] Kaiser also claims that "[t]his Court has recognized that an owner need only apply for development consistent with reasonable investment-backed expectations. . . ." *See* Kaiser's Petition, p. 24. However, neither of the authorities cited by Kaiser for this proposition is actually supportive. In *Agins v. City of Tiburon*, this Court, in finding appellants' claims not ripe for review, stated that "[a]t this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials." 477 U.S. 255, 262 (1980). The statement that the appellants in *Agins*, like Kaiser here, are free to pursue their reasonable investment expectations is hardly synonymous with the claim that they need *only* pursue such expectations.

Williamson County is even less supportive of Kaiser's claim. There, this Court noted that investment-backed expectations do not come into play until after the landowner has filed a development application. Specifically, this Court found that interference with investment-backed expectations "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191.

[45] At one point, Kaiser complains that its plans for a large hotel complex at Queen's Beach "are not possible" under current regulations. *See* Kaiser's Petition, p. 23. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates*, 477 U.S. at 353 n.9.

C. Kaiser Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation.

The second condition that must be satisfied before a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is that the landowner must prove that state procedures for obtaining just compensation are inadequate. *See Williamson County Regional Planning Comm'n*, 473 U.S. at 196-97; *Hoehne*, 870 F.2d at 534; *Lake Nacimiento Ranch Co.*, 841 F.2d at 879-80; *Austin*, 840 F.2d at 680; *Kinzli*, 818 F.2d at 1455.[46]

The courts below did not, as Kaiser suggests, *see* Kaiser's Petition, p. 26, "ignore" *Williamson County Regional Planning Comm'n*. Rather, the courts below premised their findings upon *Williamson County*. Specifically, the district court found, 649 F. Supp. at 942 (Appendix 30a), and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that "Kaiser has not met the second prong of the *Williamson County* finality doctrine. That is, Kaiser has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate."[47]

---

[46] Despite Kaiser's grumblings about "the burden on the property owner," *see* Kaiser's Petition, p. 26, the burden is upon the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate. . . ." *Williamson County Regional Planning Comm'n*, 473 U.S. at 197.

[47] Kaiser contends that there is a conflict regarding when courts have required use of state procedures. *See* Kaiser's Petition, p. 27 n.37. No such conflict exists. In all of the cases cited by Kaiser, the courts followed the general rule that until the state court has ruled that an inverse condemnation action could not be brought or has denied the plaintiff compensation, the plaintiff's claims are not ripe. The fact that in some of the cases cited by Kaiser the courts concluded that the state courts had not ruled that an inverse condemnation action could not be brought, *see Himelstein v. City of Ft. Wayne*, 898 F.2d 573, 576 (7th Cir. 1990); *Culebras Ent. Corp. v. Rivera Rios*, 813 F.2d 506, 514-15 (1st Cir. 1987); *Littlefield v. City of Afton*, 785 F.2d 596, 609 (9th Cir. 1986); *Lerman v. City of Portland*, 675 F. Supp. 11, 16 (D. Me. 1987), *aff'd*, 879 F.2d 852 (1st Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 243, *reh'g denied*, ____ U.S. ____, 110 S. Ct. 527 (1989); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir.), *cert.*

(continued)

Kaiser also suggests that the courts below "ignored clear Hawaii law" in finding that Kaiser had not satisfied the second requirement of the ripeness doctrine. *See* Kaiser's Petition, p. 26. Kaiser argues, citing *Allen v. City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977), that Hawaii does not allow damages for inverse condemnation. *See* Kaiser's Petition, p. 27. The courts below did not "ignore" *Allen*. To the contrary, the district court distinguished *Allen* as follows:

> *Allen* concerned compensation for zoning estoppel and not regulatory takings. While *Allen* indicates that the state court might generally look on damages for development costs with disfavor, it does not necessarily preclude compensation for . . . Kaiser's claims.

649 F. Supp. at 942 (Appendix 30a-31a). The court of appeals concurred with the district court's treatment of *Allen*. 898 F.2d at 113 (Appendix 46a).

Kaiser also cites *City and County of Honolulu v. Chun*, 54 Haw. 287, 506 P.2d 770 (1973), and *Honolulu Memorial Park, Inc. v. City and County of Honolulu*, 50 Haw. 189, 436 P.2d 207 (1967), in support of its argument that Hawaii does not allow damages for inverse condemnation. *See* Kaiser's Petition, pp. 27-28. Kaiser did not refer to *Chun* before the district court and Kaiser has never before referred to *Honolulu Memorial Park*.[48] Therefore, these cases should be given little, if any, weight by this Court in determining whether Kaiser satisfied its burden below.

---

[47] (continued)
denied, 488 U.S. 852 (1988), and in others the courts concluded that the state courts had ruled that an inverse condemnation action could not be brought, *see Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519 (11th Cir. 1987), *aff'd*, 904 F.2d 585 (11th Cir. 1990); *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1372 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1132 (1990) does not create a conflict.

[48] Since Kaiser did not argue either of these cases before the district court and only argued *Chun* before the court of appeals, Kaiser is less than forthright with this Court when it states that these cases must have been "misread" by the courts below. *See* Kaiser's Petition, p. 27.

In any event, these cases do not support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts. *Chun*, which Kaiser cites for the proposition that "Hawaii did not follow the rule that property owners are entitled to compensation for oppressive precondemnation activities under the Fifth Amendment," *see* Kaiser's Petition, p. 29 n.40, is a direct condemnation action. Rather than offering any insight into how the court would handle an action in inverse condemnation, *Chun* discusses when the value of the taking is to be established in a direct condemnation action. 54 Haw. at 288-289. *Chun* concludes that, in a direct condemnation action, the value of the condemned property is set at the date of the summons. *Id.* at 289. *Chun* does not foreclose a property owner from filing an inverse condemnation action for damages occurring prior to that date.

Kaiser's new-found reliance on *Honolulu Memorial Park* is even more misplaced. *Honolulu Memorial Park* is an action for ejectment. In explaining the nature of an action for ejectment, the court stated that "it does not in any way include condemnation of property," 50 Haw. at 194, and, therefore, "evidence [of damages] is immaterial. . . . " *Id.* Obviously, neither *Chun* nor *Honolulu Memorial Park* can fairly be said to support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts.[49]

---

[49] Kaiser states that the City has conceded that there is no adequate damage remedy for inverse condemnation under Hawaii law. *See* Kaiser's Petition, p. 28 n.39. That statement requires elaboration. No such concession was made in this case. In *Lai*, the defendant City and County of Honolulu stipulated that there were no state procedures in Hawaii for recovering just compensation pursuant to inverse condemnation claims. It would appear that the stipulation executed by the parties in *Lai* was ill-advised. In *Austin*, where the defendant City and County of Honolulu did not enter into a stipulation regarding the availability of state remedies, the Ninth Circuit concluded that the plaintiff could seek compensation pursuant to the Hawaii Constitution and Haw. Rev. Stat. § 101-3. 840 F.2d at 681. The *Austin* court then held that the plaintiff's claim was not ripe because the plaintiff had failed to prove that relief under those state laws would be inadequate. *Id.* at 680-81.

(continued)

The courts below properly concluded that Kaiser had failed to prove that just compensation is not available under Hawaii law. Given that conclusion and the earlier conclusion that Kaiser had failed to meet the final decision requirement, Kaiser's takings claims are not ripe for federal adjudication.

CONCLUSION

For the foregoing reasons, the Respondent City and County of Honolulu respectfully urges this Court to deny the Petitioners' petition for a writ of certiorari.

Respectfully submitted,

H. BISSELL CAREY, III
Counsel of Record

STEVEN L. RICHARDS
DWIGHT H. MERRIAM
ERIC D. DANIELS
ROBINSON & COLE

RONALD B. MUN
Corporation Counsel
DONNA M. WOO
Department of Corporation Counsel,
City and County of Honolulu

Attorneys for Respondent

March 8, 1991

---

[49] (continued)

Kaiser also argues that the conflicting positions in *Lai* and *Austin* support its claim that state remedies are unavailable. In affirming the district court's dismissal of certain of Kaiser's claims on ripeness grounds, the court of appeals specifically considered *Lai* and found that it did not change the validity of the district court's decision. 898 F.2d at 113 (Appendix 46a). Further, this Court, in denying certiorari to both *Lai* and *Austin*, apparently perceived no conflict.

(3)

No. 90-1108

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031
(808) 533-2242

Counsel for Petitioners Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Reply To Brief In Opposition To Petition For Writ Of Certiorari

I. Summary of the Case 1

II. The Right to Develop is an Integral Segment of Property Which is Not Rendered Immune From a Takings Challenge Simply by Virtue of Its Assignment 2

III. In Takings Claims Premised on Lack of Legitimate Regulatory Purpose, The Property Owner is Not Required to File Development Plans, Since Permitted Use of The Property is Not Relevant 5

IV. Conclusion 7

TABLE OF AUTHORITIES

Cases: PAGE

A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) 6

Agins v. City of Tiburon, 447 U.S. 255 (1980)..... 5

Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988)..... 6

Dickman v. Commissioner, 465 U.S. 330 (1984)..... 3

HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (D. Va. 1985)..... 5

Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).....*passim*

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 2

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 3

Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989)..... 6

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).....2-3, 4, 5

Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 3

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 3

Wheeler v. City of Pleasant Grove, 746 F.2d 137 (11th Cir. 1984) *later proceedings* 833 F.2d 267 (11th Cir. 1987)..... 6

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)..... 2, 6

PAGE

Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988) 5

Other Authorities:

Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zon. & Plan. L. Rept. 57 (Sept. 1988)..... 5

Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zon. & Plan. L. Rept. 57 (Sept. 1990)..... 5

Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use & Zon. Digest 3 (Jan. 1990)..... 5

Mandelker & Blaeser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zon. & Plan. L. Rept. 49 (Jul. & Aug. 1988) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1108

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT COMPANY, and KAISER HAWAII KAI DEVELOPMENT COMPANY,

Petitioners,

—v.—

CITY & COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Summary of the Case

This case was brought against the City and County of Honolulu ("City") by petitioners Kaiser[1] and Bishop, seeking, *inter alia*, relief in inverse condemnation for an uncom-

1 Petitioners will be referred to collectively as "Kaiser." A separate petition for writ of certiorari filed by intervenors/plaintiffs Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate ("Bishop") is also pending before this Court. *See Richard Lyman, Jr., et al. v. City & County of Honolulu*, No. 90-1078 (petition for cert. filed Jan. 2, 1991).

pensated taking. This taking was accomplished by ostensible regulations which in truth were an avowed effort to extort Kaiser's and Bishop's property, and by "condemnation blight," whereby property which is targeted for acquisition is *de facto* taken by delay or other unreasonable conduct as a prelude to acquisition.

The United States District Court for the District of Hawaii granted summary judgment in favor of the City against Kaiser. Kaiser possesses the exclusive right to subdivide, develop, improve, and use certain parcels of Bishop's land (known as "Queen's Beach") pursuant to a 1961 agreement ("assignment"). The district court held that the right to develop Queen's Beach is not property because Kaiser possessed it, and that Kaiser has no right to bring a takings claim when the City conditions approval of reasonable development on the "donation" to the City of portions of Queen's Beach as a public park. *Kaiser Dev. Co. v. City & County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) (Pet. App. 1a-44a). The district court also held that Kaiser's and Bishop's takings claims were not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). *See* Pet. App. 23a-31a. The court of appeals affirmed in a one paragraph *per curiam* opinion. Pet. App. 46a; 898 F.2d 112.

II. The Right to Develop is an Integral Segment of Property Which is Not Rendered Immune From a Takings Challenge Simply by Virtue of Its Assignment

The City acknowledges (*see* City's Brief in Opposition at 17) that Kaiser possesses the exclusive right to develop Queen's Beach, yet claims that this right is subject to uncompensated acquisition because Kaiser possesses the right by way of the assignment. The City ignores the decisions of this Court that hold that the right to "build upon one's own property," is a fundamental right. *E.g.*, *Nollan v. California*

Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).[2] The City claims instead that "[t]he *mere* right to develop is not a protected property right," City's Brief in Opposition at 19 n.31 (emphasis added), and reduces the fundamental right to develop and use property to a mere "expectancy" not deserving of fifth amendment protection simply because it was assigned by contract from the fee owner to a developer. *Id.* at 12-13. The City and the district court relied on *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) as dispositive of the property issue, but interestingly, both the district court and the City relegated discussion of the case at the crux of this issue, *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893), to footnotes. *See* Pet. App. 15a; 649 F. Supp. at 934; City's Brief in Opposition at 11-13.[3] The City's "analogy" of Allegheny's steel plate to Queen's Beach (City's Brief in Opposition at 12) is misleading for two reasons. First, there is no suggestion in *Omnia* that a contractual right to purchase is a fundamental attribute of property. In the present case, however, the right to develop is a fundamental property right. Second, Omnia did not have possession of the right to the steel which it claimed was taken. Here, though, Kaiser has exclusive possession of the right to develop, and has held it since 1961.

---

2 This is a long-standing principle. *See e.g.*, *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1893).

3 In *Omnia*, Omnia had the right to purchase steel from Allegheny Steel Company. Prior to delivery of the steel to Omnia, the federal government confiscated Allegheny's entire production for the following year, thus rendering delivery of the steel to Omnia impossible. *Id.* at 507. When Omnia sought compensation from the government, the Court held that the contract between Omnia and Allegheny was not taken by the government.

The City mischaracterizes Kaiser's enormous losses in this case as mere consequential results of the City's actions, and attempts to immunize itself from the requirements of the constitution by labeling its taking of the right to develop a result of common impossibility of performance or commercial frustration of contractual expectations.

By holding that developers who are assigned exclusive possession of a landowner's property right to develop (but do not possess a traditional estate in land) have no rights when the right to develop property is taken, the courts below treat developers as pariahs—a class of property owners without rights who may be trampled upon by open and notorious extra-legal municipal conduct without regard to the constitution.

The decisions of this Court have never required that a property owner possess a physical interest in land in order to have standing to assert a taking. When governmental action confiscates an entire "stick" of the property bundle such as the right to develop, it is enough that the person claiming the taking have a present personal interest in that stick sufficient to demonstrate standing.[4] *See* authorities at 12-14 of Kaiser's Petition for Writ of Certiorari. *Cf.* Pet. App. 16a n.8; 649 F. Supp. at 935 n.8 (Kaiser has no property since it did not possess a tangible right). Kaiser's right to develop, however, is a tangible right, both to the parties and to the courts,[5] without regard to whether an owner is "vested" under state law. *See Nollan*, 483 U.S. at 833 n.2.[6] In the present case, Kaiser is in

---

4 The City asserts that Bishop, as the fee owner, would have standing to claim the value of the development rights in this case. *See* City's Brief in Opposition at 19 n.23. Bishop, however, has no standing to claim its development rights have been taken, since it assigned these rights exclusively to Kaiser. It is notable that the City criticizes Kaiser for "mischaracterizing" the assignment, yet the City's selective account of the assignment fails to mention the specific language by which Bishop and Kaiser explicitly recognized Kaiser's property interest. *See* Kaiser's Petition for Writ of Certiorari at 6.

5 The City claims three Hawaii cases hold that Kaiser's right to develop is not property. City's Brief in Opposition at 19 n.31. As noted in Kaiser's Petition at 14 n.22, however, each of these cases involved Kaiser's interest in parcels already developed by Kaiser. Therefore, under the terms of the assignment, Kaiser had no interest in developing those parcels, since the development process was over.

6 The district court noted that vesting is not relevant to whether Kaiser's right to develop is property. Pet. App. 22a n.14; 649 F. Supp. at

possession of that tangible right, and must have standing when it has been taken without compensation.

III. In Takings Claims Premised on Lack of Legitimate Regulatory Purpose, The Property Owner is Not Required to File Development Plans, Since Permitted Use of The Property is Not Relevant

The City asserts that the lower courts are not in a state of conflict and confusion over rational application of the ripeness standard. Many courts and commentators dispute the City's position.[7]

The City also asserts Kaiser's claim that the City's actions were without legitimate regulatory purpose is not ripe until an application for preservation uses is filed. City's Brief in Opposition at 21-23. The City overlooks the fact that when a municipality undertakes a course of conduct without a legitimate regulatory purpose, applications for use are irrelevant, and a case is ripe regardless of the economic uses available to the property owner after the unconstitutional conduct. *See Nollan*, 483 U.S. at 830; *Agins v. City of Tiburon*, 447 U.S. 255 (1980).[8] The focus of such cases is on the govern-

---

938 n.14. Yet, the City impliedly asserts that until a developer has vested under state law, it has no standing to contest a taking of development rights. *See* City's Brief in Opposition at 20 n.33.

7 *See, e.g., Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1201 n.6 (N.D. Cal. 1988); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 671 (D. Va. 1985). *See also* Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zon. & Plan. L. Rept. 57 (Sept. 1990); Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use & Zon. Digest 3 (Jan. 1990); Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 Zon. & Plan. L. Rept. 57 (Sept. 1988); Mandelker & Blaeser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zon. & Plan. L. Rept. 49 (Jul.-Aug. 1988).

8 See also Brief Amicus Curiae of Pacific Legal Foundation in Support of the Petition for Writ of Certiorari (No. 90-1078) at 9-12 and authorities cited therein.

ment conduct, not the reasonable uses left the property owner. Here too, the lower courts are split.[9]

The application requirement of *Williamson County* was formulated to avoid having the courts decide claims that all viable use of property had been taken when it was uncertain whether any viable uses were left after regulation. *Williamson County*, 473 U.S. at 191. In a context where the government's purpose is not challenged, an application is necessary to fix the government's position. When, however, a takings claim is premised on a lack of legitimate regulatory purpose (and the government's position is fixed), the uses left the property owner (and thus the application requirement) are irrelevant. The absence of a legitimate purpose reveals the government's position, and ripens the claim.

That is precisely the circumstance here—the City made it clear throughout that no private use of Queen's Beach would be permitted unless the most valuable portions were "donated" for use as a public park. The decision by the City to disallow any use without this "gift" was a final decision. It would be pointless to require Kaiser to apply for uses the City made it clear it would not permit, or to require Kaiser to seek a "variance" from such illegal conduct, simply to gain a key to the courthouse door, when its applications for every conceivable viable economic use had previously been denied.[10]

---

9 *Compare Wheeler v. City of Pleasant Grove*, 746 F.2d 137 (11th Cir. 1984) *later proceedings* 833 F.2d 267 (11th Cir. 1987) *and A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *with Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989) *and Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

10 Additionally, where as here, economic viability of permitted uses is a genuine issue of fact and the City has repeatedly stated that no development plan would be approved until property was "dedicated," the property owner should not be required to file an application solely to fix the City's position. The City's position is concrete: no "gift," no development. Prior to the City downzoning and down-designating Queen's Beach as "preservation," Kaiser made at least seven meaningful applications for economically viable development, each in accordance with the then-existing land use regulation. Each application was denied. It is not surprising that the City would have Kaiser file an

IV. Conclusion

For the foregoing reasons, and for the reasons contained in Kaiser's Petition, it is respectfully prayed that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,

R. Charles Bocken
Kenneth R. Kupchak
Robert H. Thomas
DAMON KEY BOCKEN LEONG KUPCHAK
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 531-8031
(808) 533-2242

Counsel for Petitioners
Kaiser Development Company, aka KACOR Development Company and Kaiser Hawaii Kai Development Company

---

application for "development" under preservation uses, since that would allow the City to downzone property with impunity, unless property owners spent the enormous time, effort, and money required to file illusory development plans. Such a scheme would effectively eliminate the complaints of property owners who could not afford to comply with such an expensive pointless requirement.